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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1936

## No. 218

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. C. HANDASYDE WHITNEY, APPELLANT,

*vs.*

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, TAX COMMISSIONERS OF THE STATE OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED JULY 22, 1936.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1936

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THE PEOPLE OF THE STATE OF NEW YORK, EX REL. C. HANDASYDE WHITNEY, APPELLANT,

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MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, TAX COMMISSIONERS OF THE STATE OF NEW YORK

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APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

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# NEW YORK SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT.

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| PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY, Relator, vs. MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York, Defendants. | On Certiorari to Review Determination of Tax Commission. |

## Statement Under Rule 234.

This is a certiorari proceeding brought under Section 375 of the Tax Law of the State of New York to review the action of the New York State Tax Commission in assessing an income tax and an additional income tax against the relator, a non-resident individual, based upon the Tax Commission's assessment dated March 8, 1933, for the relator's taxes against the relator's income alleged to have been received or earned in the State of New York during the year 1929.

The proceeding was commenced by service of petition and notice of application for writ of certiorari upon the State Tax Commission on February 27, 1935, returnable March 8, 1935,

4 *Statement Under Rule 234*

before Special Term Supreme Court, Albany County. An undertaking in form approved by a Justice of the Supreme Court was served upon the State Tax Commission on February 27, 1935, before the application was made. The order granting the writ and the writ were granted and issued on March 8, 1935, and was served upon the State Tax Commission March 13, 1935. A return to the writ was filed on March 28, 1935, and a copy thereof was served upon the relator's attorney on March 29, 1935.

5 The names of the present parties appear in full in the above title, and there has been no change of parties or attorneys herein.

Argument was had at the October, 1935, Term of the Appellate Division, Third Department, and a decision rendered on November 13, 1935, unanimously confirming the determination of defendants. Notice to Appeal from the order of said court entered November 18, 1935, was served on March 12, 1936, pursuant to permission granted by order of the Court of Appeals entered March 10, 1936.

6

**Notice of Application for Writ, Served February 27, 1935, Filed March 8, 1935.** 7

SUPREME COURT,

ALBANY COUNTY.

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|---|---|
| PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY, Relator, vs. MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York, Defendants. | Notice of Application for Writ of Certiorari. 8 |

To the above named Defendants:

Please Take Notice that upon the annexed petition of C. Handasyde Whitney, verified on the 11th day of January, 1935, the undersigned will apply to the Supreme Court at a special term thereof appointed to be held in and for 9 the County of Albany, at the Court House in the City of Albany, on the 8th day of March, 1935, at the opening of Court on that day, or as soon thereafter as counsel may be heard, for a writ of certiorari to be issued out of said Court substantially in the form specified in said annexed petition and to such other and further relief as may be just.

CLARK, CARR & ELLIS,
Attorneys for Petitioner-Relator,
Office and P. O. Address,
120 Broadway,
Borough of Manhattan,
New York, N. Y.

Dated, February 26, 1935.

10 **Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935.**

SUPREME COURT,

ALBANY COUNTY.

| | |
|---|---|
| PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY, Relator, | Petition for Writ of Certiorari. |
| 11 vs. | |
| MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York, Defendants. | |

To the Supreme Court of the State of New York:

Petition of C. Handasyde Whitney, the above named relator, respectfully shows and alleges
12 to this Court:

1. The petitioner is, and at all times hereinafter mentioned was, a resident of and domiciled in the Commonwealth of Massachusetts and has never had any residence, domicile or place of business in the State of New York.

2. That in 1909 petitioner purchased a membership in the New York Stock Exchange; that the cost of said membership amounted to $77,000; that since 1909 this membership or seat has been owned by the petitioner and his partners, with varying interests, which in 1929 were as follows:

*Petition for Order and Writ of Certiorari. Served February 27, 1935, Filed March 8, 1935*

| | |
|---|---|
| Petitioner C. Handasyde Whitney | 25% |
| Geoffrey G. Whitney | 25% |
| J. Chester Hutchinson | 25% |
| William D. Elwell | 25% |

3. That all of the partners above referred to are, and at all times hereinafter mentioned were, residents of and domiciled in the Commonwealth of Massachusetts and at no time has any of them, either individually or as a firm, had any 14
residence, domicile or place of business in the State of New York, nor have they or any of them ever carried on, engaged in or transacted any business within the State of New York.

4. That the membership or seat stands in the petitioner's name on the records of the New York Stock Exchange, and so far as that organization is concerned the petitioner is the legal owner thereof.

5. That the New York Stock Exchange is a voluntary association which consisted of 1,100 15
members for some time prior to 1929; that about March 1, 1929, by proper resolutions of the association members the membership was increased 25 per cent to 1,375; that the holder of each such membership thereby became entitled in addition to his membership to a so-called "right" to one-fourth of a new membership; during the year 1929 the right attaching to the membership registered in the petitioner's name was sold for $108,000, and during said year said "right" to a membership was transferred to the purchaser and payment therefor received.

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6. The membership on the said Stock Exchange vests in the member no title to property, and while held by a duly accredited member, merely results in certain benefits and permits the restricted exercise of certain rights and privileges by the member either in connection with his business wherever the same may be carried on or completely aside and apart from the business
17 of the member. One of such benefits accruing to the petitioner by virtue of said membership was the receipt of the said fractional "right" which when combined with three other such fractions would constitute a right to a new membership, subject to said Exchange's rules in reference to the transfer of memberships and admission of members. Neither the said Stock Exchange membership nor any of the rights and privileges thereof were ever used in connection with any business of the petitioner or any of his partners within the State of New York; the benefit from such membership con-
18 sisting of said fractional "right" to another membership was not acquired in connection with, as a part of, or as the result of, nor was it ever used in connection with any business transacted or carried on within the State of New York by said petitioner or any of his partners; and the said Stock Exchange membership and the said benefit derived therefrom, consisting of said fractional "right" to another membership, if property at all, each consisted solely of intangible personal property without any situs, business or otherwise, within the State of New York, and the sole situs thereof for taxing and

all other purposes was in the Commonwealth of Massachusetts which was the domicile of the petitioner and his said partners at all times mentioned herein. The taxable situs of said fractional right to another membership on the said Stock Exchange being in Massachusetts, the petitioner and all of his said partners took their respective profits on the sale of said fractional "right" into their tax returns to the Commonwealth of Massachusetts and each has paid all taxes levied by virtue of their said returns and no other state tax thereon is leviable or lawful.

7. Although membership in the New York Stock Exchange entitled the holder to be personally present and transact business on that exchange, the only business conducted by the petitioner or his firm consisted of a general securities and commission business buying and selling securities in the Boston market. The only use which the petitioner and his firm made of the privileges incident to membership in the New York Stock Exchange was to transmit orders for the account of their customers in the Boston market; which were transmitted by private wire to independent contractors who were other members of that Exchange transacting business in New York. These New York correspondents of the petitioner's firm executed in their own name and for their own account as principals such orders sent them by the petitioner's firm, the name of the petitioner's firm never appearing in the execution of such trans-

22 *Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935*

action on the exchange and the name of the petitioner's firm's customer never appearing on the New York firm's records. In handling such orders the petitioner's firm was the customer of the New York correspondent which carried the account of petitioner's firm in accordance with the standard form of customer's agreement, so that all of the business transacted by the
23 petitioner's firm was carried on in Boston, Massachusetts, and any part of their customers' orders which required execution in New York were executed in New York by the New York correspondents for the petitioner firm as a customer.

8. That the defendants above named are the duly appointed, qualified and acting Tax Commissioners of the State of New York, and as such constitute the Tax Commission of the State of New York, and that the defendants above named are hereinafter referred to as the "Com-
24 mission."

9. That for the calendar year 1929 the petitioner did not file any income tax return pursuant to Article 16 of the Tax Law of the State of New York on the ground that petitioner was a non-resident of the State of New York and had no income from business or property within the State of New York.

10. That no return of personal income having been filed by petitioner for the taxable year 1929, on March 8, 1933, an assessment of tax in the amount of $2,115, No. 562190, was duly stated by the Commission and notice thereof

mailed to the taxpayer; that thereafter on March 22, 1933, a return was filed with the Commission by petitioner under protest upon which the tax was computed by petitioner at $283; and that said return was duly audited and the amount of tax due under said assessment No. 562190 was adjusted at $181.82 and the balance thereof cancelled.

11. That on May 5, 1933, an additional tax of $98.18 was found by the Commission due upon the audit of said return; that due notice thereof was given to the taxpayer, under additional assessment No. 567511, on said date, making a total of said taxes and additional taxes for the said year 1929 of $280, which were paid by the petitioner under protest and taxes in a like amount and manner were assessed against and paid by the said partners of this petitioner.

12. That the said taxes and additional taxes levied for the year 1929 were based upon the difference between one-fifth of the original cost price of the seat to the petitioner, plus $600 which was one-fifth of the contributions paid in the form of dues, to capital of the New York Stock Exchange and the sale price of the seat "right"; that the total profits so calculated was divided in accordance with the New York Tax Law among the petitioner and his partners and in accordance with their respective interests as shown above.

13. That within one year from the date when said tax of $280 was audited and stated by the Commission and on or about the 5th day of

*Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935*

March, 1934, the petitioner, pursuant to the provisions of Section 374 of the Tax Law of the State of New York, made formal application to the Commission for a revision and readjustment of the tax liability of the petitioner for the calendar year 1929 and requesting hearing thereon.

14. That thereafter and on or about the 13th day of June, 1934, the petitioner entered into a stipulation with the Commission, waiving formal hearing before the Commission, and on said 13th day of June, 1934, the matter came on for hearing before Roy H. Palmer, Esq., First Assistant Director of the New York State Income Tax Bureau; that the taxpayer was represented thereat by Marcien Jenckes, Attorney, 30 State Street, Boston, Massachusetts; that a stipulation was entered that the record of such hearing should be of the same force and effect as if taken in a formal hearing before the State Tax Commission that thereafter the record came before the Commission for a review.

15. That thereafter and on or about the 17th day of December, 1934, petitioner received by mail from the Commission a notice dated December 10, 1934, setting forth the determination and decision of the Commission that the computation of the taxes and additional taxes of the petitioner for the year 1929 in accordance with the audit of said return was correct; that the said taxes so stated were properly assessed and due; that said taxes did not include any taxes or other charges which should not have

been lawfully demanded; that no payment had been illegally made or exacted thereupon; and that the taxpayer was not entitled to any further resettlement of the taxes so assessed.

16. Upon information and belief, that such determination and decision by the Commission of the aforesaid income tax, in the amount of $280, is not subject to any further review or appeal except to this Court for the writ herein sought.

17. That notice of application to this Court for a writ of certiorari to review said determination and decision of the Commission has been duly given to the Commission on the 27th day of February, 1935, and within ninety days after the service on the petitioner of the notice of such determination and decision.

18. That no previous or other application has been made to any court of justice or to any judge of justice for the writ or order sought in this petition.

19. Upon information and belief, that said alleged tax of $280 as recomputed as aforesaid is illegal and void under the laws of the State of New York and in violation of the Constitution of the United States.

Wherefore, the petitioner prays that a writ of certiorari proceed and issue out of this Court, directed to the said Mark Graves, John J. Merrill and John P. Hennessey, as Tax Commissioners of the State of New York, commanding them to certify and return to this Court:

*Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935*

All and singular, the proceedings, decisions and actions of the Commission had and made in the premises, the records of the proceedings had before them at said hearing in this matter, including all papers or affidavits submitted to them and a transcript of the testimony taken in connection therewith before Roy A. Palmer, Esq., First Assistant Director of the New York
35 State Income Tax Bureau, on June 13, 1934; and to the end that the petitioner may have such other and further relief as to this honorable Court may appear just.

C. HANDASYDE WHITNEY,
Petitioner-Relator.

Clark, Carr & Ellis,
Attorneys for Petitioner-Relator,
Office and P. O. Address,
120 Broadway,
Borough of Manhattan,
New York, N. Y.

36

Choate, Hall and Stewart,
30 State Street,
Boston, Massachusetts.

Marcien Jenckes,
30 State Street,
Boston, Massachusetts.

Of Counsel.

Commonwealth of Massachusetts,
County of Suffolk, ss:

C. Handasyde Whitney, being duly sworn, deposes and says:

*Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935*

That he is the petitioner-relator named in the foregoing petition and that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

C. HANDASYDE WHITNEY.

Subscribed and sworn to before me this
11th day of January, 1935.
Ethleen Heuser,
My commission expires March 21, 1941.

(Seal)

Service admitted by State Tax Commission, February 27, 1935.

Commonwealth of Massachusetts,
Clerk's Office of Superior Court.

Suffolk, ss:

I, Francis A. Campbell, of Boston, in said County, duly elected, qualified and sworn as Clerk of the Superior Court, for and within said County and Commonwealth, dwelling in Boston in said County, said Court being a Court of record with a seal which is hereto affixed, the records and seal of which Court I have the custody, do herein and hereby in the performance of my duty as said Clerk, certify and attest that Ethleen Heuser before whom the annexed affidavit, proof or acknowledgment was taken and subscribed, is a Notary Public for, within,

*Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935*

and including the whole of said Commonwealth, doing business in said County, duly appointed, commissioned, qualified, sworn and authorized by the laws of said Commonwealth to act as such; and also duly authorized by the laws of said Commonwealth to take affidavits and take and certify proofs of acknowledgment of deeds or conveyances for lands, tenements, hereditaments, lying and being in said Commonwealth; in any part thereof and to be recorded therein, wherever situated and however bounded; that she was at the time of taking the affidavit, proof or acknowledgment, hereto annexed, such Notary Public that due faith and credit are and ought to be given to her official acts; that I am well acquainted with her signature and handwriting, and I verily believe that the signature to the said affidavit, proof or acknowledgment is genuine, and, further, that the annexed instrument is executed and acknowledged according to the laws of said Commonwealth.

Witness my hand and the seal of said Court at Boston, in said County and Commonwealth, this 11th day of January, A. D. 1935.

FRANCIS A. CAMPBELL,
Clerk.
By JOHN L. MACCUBBIN,
Asst. Clerk.

(Seal)

**Undertaking for Costs Filed February 27, 1935.**

SUPREME COURT,

ALBANY COUNTY.

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY,
Relator,
against
MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York,
Defendants.

WHEREAS, the above named C. Handasyde Whitney, heretofore applied to the Tax Commission of the State of New York to revise, readjust and resettle the account theretofore audited and stated by said Tax Commission against said C. Handasyde Whitney for an income tax aggregating Two Hundred Eighty and 00/100 ($280.00) Dollars, based on income received by said C. Handasyde Whitney during the calendar year ending on the 31st day of December, 1929, as provided by Section 374 of the Tax Law of the State of New York; and a hearing having been had upon said application and the said Tax Commission having thereafter made its determination dated the 10th day of December, 1934, denying the said application for revision, readjustment and resettlement of the said account; and

46 *Undertaking for Costs, Filed February 27, 1935*

WHEREAS, said C. Handasyde Whitney is dissatisfied and aggrieved by said determination and intends to review said determination by writ of certiorari and desires to file an undertaking with said Tax Commission as required by Section 375 of said Tax Law of the State of New York;

NOW, THEREFORE, the Fidelity and Casualty Company of New York, a corporation organized and existing under and by virtue of the
47 laws of the State of New York, and duly authorized by the State of New York to execute surety bonds, having an office and principal place of business at #30 Maiden Lane, in the Borough of Manhattan, City, County and State of New York, does hereby undertake that if the said writ of certiorari, which may be granted upon the application of said C. Handasyde Whitney to review the said determination of the said Tax Commission be affirmed, said C. Handasyde Whitney will pay all costs and charges which may accrue against him in the prosecution of
48 said writ, including the costs of all appeals, not exceeding the sum of Five Hundred and 00/100 ($500.00) Dollars.

Dated, New York, February 26th, 1935.

THE FIDELITY AND CASUALTY
COMPANY OF NEW YORK,
By HAROLD PENNINGTON,
Attorney.

*Undertaking for Costs, Filed February 27, 1935*

FINANCIAL STATEMENT

## THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

December 31st, 1934.

### Assets

| | |
|---|---|
| Bonds and Stocks | $26,854,088.00 |
| Real Estate. | 219,239.83 |
| Premiums in course of collection (not 90 days overdue) | 4,169,301.32 |
| Interest accrued | 181,770.70 |
| Cash on deposit and in office | 2,320,783.85 |
| All other assets | 552,865.91 |
| Total Assets | $34,298,049.61 |

### Liabilities

| | | |
|---|---|---|
| Unearned premiums | | $10,511,049.25 |
| Reserve for claims | | 15,612,867.88 |
| Reserve for taxes and expenses | | 1,424,431.37 |
| Reserve for all other liabilities | | 850,000.00 |
| Net Surplus | $3,649,701.11 | |
| Capital Stock | 2,250,000.00 | |
| Surplus to Policy Holders | | 5,899,701.11 |
| | | $34,298,049.61 |

At the regular meeting of the board of directors of The Fidelity and Casualty Company of New York, held at its office in the City of New York on the 21st day of November, 1934, a quorum being present, the following resolution was unanimously adopted:

52 *Undertaking for Costs, Filed February 27, 1935*

RESOLVED, That each of the following persons, to wit: Ernest Sturm, chairman of the board; Bernard M. Culver, president of the company; Frank A. Christensen, Charles L. Newmiller and Hale Anderson, each a vice-president of the company; William L. Bates, a secretary of the company; William P. Harvey, an assistant secretary of the company; Louis F. Ballerene, Arthur C. Borgeson, John C. Brodsky, Louis B. Caziarc, Arthur T. Clayton, George E. Friend,
53 Daniel J. Gallagher, Cornelius P. Godley, Thomas F. Graham, James R. Hillas, George C. Kaiser, William L. Macalister, Chauncey B. Manee, Joseph B. Mettalia, Delphine L. Michaud, Harold Pennington, John A. Rogers, Frank B. Smedes, Robert Steinemann, George E. Summerhayes, Charles Swanson, Harry V. Upington, Joseph G. Veit, Sara B. Voorhees and Arline M. Witbeck, each as an attorney, is hereby authorized to execute on behalf of The Fidelity and Casualty Company of New York bonds, undertakings, and contracts of suretyship; including agreements of co-suretyship and rein-
54 surance; and to attest the corporate seal of the company to any and all bonds, undertakings and contracts of suretyship signed by any of the said persons; provided—

1. That the authority herein granted to Louis B. Caziarc, Arthur T. Clayton, George E. Friend, Cornelius P. Godley, Thomas F. Graham, James R. Hillas, George C. Kaiser, William L. Macalister, Frank B. Smedes, Robert Steinemann, George E. Summerhayes, Charles Swanson, Joseph G. Veit and Arline M. Witbeck, shall be limited to bonds, undertakings and contracts of

suretyship of not more than one hundred thousand dollars unless the said bonds, undertakings or contracts of suretyship shall also be signed by the chairman of the board, the president, one of the vice-presidents, the secretary, or the assistant secretary named above.

2. That the authority herein granted to Louis F. Ballerene, Arthur C. Borgeson, Daniel J. Gallagher, Joseph B. Mettalia, Chauncey B. Manee, Delphine L. Michaud, Harold Pennington, John A. Rogers and Sara B. Voorhees, shall be limited to bonds, undertakings, or contracts of suretyship of not more than twenty-five thousand dollars unless the said bonds, undertakings or contracts of suretyship shall also be signed by the chairman of the board, the president, one of the vice-presidents, the secretary, or the assistant secretary named above.

3. That the authority herein granted shall become effective January 1, 1935, and shall expire December 31, 1935.

RESOLVED, further, that the appointment of each of the persons named herein to his or her respective office or position is hereby confirmed, and that the said appointees be, and each of them hereby is, authorized and empowered to certify, under seal, a copy of the foregoing resolution.

State of New York,
County of New York, ss:
City of New York,

Harold Pennington, to me known, being by me duly sworn, deposes and says that the affiant

58 *Undertaking for Costs, Filed February 27, 1935*

resides in Brooklyn, New York; that the affiant is an attorney of The Fidelity and Casualty Company of New York, the corporation which is described in and which executed the annexed instrument; that the affiant knows the corporate seal of said corporation; that the seal affixed to the annexed instrument is the corporate seal of The Fidelity and Casualty Company of New York, and was thereto affixed by order and authority of the board of directors of the said
59 company; and that the affiant signed the affiant's name thereto by like order and authority as an attorney of the company. The affiant further deposes and says that the foregoing financial statement of The Fidelity and Casualty Company of New York, to the best of the affiant's knowledge and belief is a full, true, and correct statement of the financial condition of the said company on the 31st day of December, 1934, and that the liabilities of said company do not exceed its assets as ascertained in the manner provided by law; and that the said company has received from the Superintendent of Insurance
60 of the State of New York a certificate of solvency and of its sufficiency as surety, or guarantor, pursuant to the Insurance Law of the State of New York and the Acts Amendatory thereof and supplemental thereto, and that such certificate has not been revoked. The affiant deposes and says that the affiant has compared the foregoing resolution of the board of directors of the said company with the original thereof, as recorded in the minute book of the said company, and does hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said resolution, and the same

*Undertaking for Costs, Filed February 27, 1935*

is now in full force, and that the seal affixed thereto is the corporate seal of the said company.

HAROLD PENNINGTON,
Attorney.

Subscribed and sworn to before me this
26th day of February, 1935.
George C. Kaiser,
Notary Public,
Bronx Co. No. 10, Register's No. 22K36.
Certificates filed in
New York Co. No. 240, Register's No. 6K121.
Kings Co. No. 149, Register's No. 6194.
Queens Co. No. 339, Register's No. 2053.
Richmond Co., Westchester Co. and Register.
Commission expires March 30, 1936.

Undertaking approved February 27, 1935, by Hon. Gilbert V. Schenck, Justice of New York Supreme Court.

BOND OF

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

80 Maiden Lane New York City

I approve the bond attached and the sufficiency of the Surety.

GILBERT V. SCHENCK,
*J. S. C.*

Dated: February 27, 1935.

64 **Affidavit of Service of Undertaking.**

SUPREME COURT,

ALBANY COUNTY.

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY,
Relator,

vs.

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as
65 Tax Commissioners of the State of New York,
Defendants.

State of New York,
City and County of Albany, ss:

James J. Carroll, being duly sworn, deposes and says that he is over the age of twenty-one years and that he resides in City of Cohoes, New York; that on the 27th day of February, 1935, he filed with the New York State Tax Commission the security bond required by Section 155 of the Civil Practice Act to indemnify
66 the People of the State of New York against the costs and disbursements of the above entitled proceeding to review the determination of the said Commission in assessing an income tax against the relator for the year ending December 31, 1929, and deponent further says that said bond was filed in the office of Seth T. Cole, Deputy Commissioner, with the secretary of said Deputy Commissioner, who is duly authorized to receive the same, and said bond was made by The Fidelity and Casualty Company of New York on the 26th day of February, 1935.

JAMES J. CARROLL.

Subscribed and sworn to before me, this
28th day of February, 1935.
Stella F. Lane,
Notary Public.

**Notice of Issue, Filed February 28, 1935.** 67

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ALBANY.

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY,
Relator,
against
MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York,
Defendants. 68

Particular nature of issue and the object of the action Petition and Notice for Writ of Certiorari.

CLARK, CARR & ELLIS,
Attorneys for Petitioner-Relator.

The Clerk will please file this Note of Issue 69 for next Special Term of this Court, appointed to be held March 8, 1935.

Yours, etc.,

CLARK, CARR & ELLIS,
Attorneys for Petitioner-Relator.

70 **Order Granting Writ of Certiorari.**

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Court House, in the City of Albany, on the 8th day of March, 1935.

Present: Hon. Ellis J. Staley, Justice.

71 PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY,
Relator,
vs.
MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York,
Defendants.

72 Notice of application for a writ of certiorari herein having been duly served at least eight days prior to the return date of such application upon Mark Graves, John J. Merrill and John P. Hennessey, as Tax Commissioners of the State of New York, and said application having heretofore come on to be heard at a special term of this Court on the 8th day of March, 1935; upon reading and filing the notice of application, the admission of service thereof and the duly verified petition of C. Handasyde Whitney for a writ of certiorari for the purpose of reviewing an income tax for the year ending December 31, 1929, assessed and collected by the State Tax Commissioners of the State of New York against C. Handasyde Whitney, and after hearing Nelson R. Pirnie, of Counsel for

*Order Granting Writ of Certiorari* 73

C. Handasyde Whitney, petitioner-relator herein, in support of the application and no one having appeared in opposition thereto and due deliberation having been had thereon, it is

Ordered, that a writ of certiorari issue as prayed for in such petition, directed to Mark Graves, John J. Merrill and John P. Hennessey, as Tax Commissioners of the State of New York, and that such writ be returned to the County Clerk of the County of Albany, State of New York, and that said writ be allowed and signed 74 and sealed by the Clerk of this Court.

Entered in Albany County:

ELLIS J. STALEY,
*J. S. C.*

No. 506.

State of New York,
County of Albany, Clerk's Office, ss:

I, John A. Knox, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, 75 Do Hereby Certify that I have compared the annexed copy Order & Writ with the original thereof filed in this office on the 12 day of March, 1935, and that the same is a correct transcript therefrom, and of the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, this 13 day of March, 1935.

JOHN A. KNOX,
Clerk.

(Seal)

Service admitted March 13, 1935, State Tax Commission by Seth T. Cole, Deputy Commissioner.

76 **Writ of Certiorari.**

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY

To

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York.

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GREETING:

WHEREAS, we have been notified by the petition of C. Handasyde Whitney, verified the 11th day of January, 1935, that acting as Tax Commissioners of the State of New York you have assessed against and collected from the said petitioner an income tax in the sum of Two hundred and eighty dollars ($280), based upon income alleged by you to have been received by said petitioner during the calendar year ending the 31st day of December, 1929; that within
78 one year from the time when the said income tax of $280 was audited and stated by the State Tax Commissioners and on or about the 5th day of March, 1934, the said petitioner filed with the said Tax Commissioners an application for a revision and readjustment of the said income tax; that thereafter and on or about the 13th day of June, 1934, the petitioner was granted a hearing upon said application before Roy H. Palmer, Esq., First Assistant Director of the State Income Tax Bureau, it having been stipulated that the record thereof should be of the same force and effect as though taken in a

formal hearing before the State Tax Commission; that thereafter such record came before the Tax Commissioners for review; that thereafter and on or about the 17th day of December, 1934, the said petitioner received a notice dated December 10, 1934, setting forth the determination and decision of the said Tax Commissioners that the computation of the taxes and additional taxes against said petitioner for the year 1929 in accordance with the audit of the return filed was correct and that said taxes in the 80
sum of $280 so stated were properly assessed and due and did not include any taxes or other charges which should not have been lawfully demanded and that no payment had been illegally made or executed thereupon and that petitioner was not entitled to any further resettlement of the taxes so assessed; that notice of application to this Court for a writ of certiorari to review said determination has been duly given to the said Tax Commissioners on or before the 27th day of February, 1935, and within ninety days after the service on said petitioner of the notice of said determination; and said petitioner 81
claiming that said final assessment and collection of said income tax of $280 and that the said determination and decision by the said Tax Commissioners are illegal and void to the full extent of said assessment of $280 for the reasons stated in paragraph 20 of said petition, namely:

"That said alleged tax of $280 as recomputed as aforesaid is illegal and void under the laws of the State of New York and in violation of the Constitution of the United States."

82 *Writ of Certiorari*

and we being willing that justice be done in the premises,

NOW, THEREFORE, WE COMMAND that you, the said Mark Graves, John J. Merrill and John P. Hennessey, as Tax Commissioners of the State of New York, do certify and return, all and singular, the proceedings, decision and actions of the aforesaid Tax Commissioners had and made in the premises, the records of the proceedings had before them on said hearing in
83 this matter, including all papers and affidavits submitted to them and, all and singular, other matters material to the determination, assessment and collection of the aforesaid alleged income tax of $280 to the County Clerk of the County of Albany, State of New York, together with this writ, to the end that the proceedings, decisions and actions had by you as Tax Commissioners of the State of New York in the matter of the assessment, collection and determination of the aforesaid income tax may be reviewed and corrected on the merits by said
84 Court and in order that said Court may further cause to be done thereon what of right should be done.

WE DO HEREBY FURTHER COMMAND YOU to serve a copy of your said return to this Court on or before twenty days after service of said writ, on Clark, Carr & Ellis, the petitioner's attorneys, at their office No. 120 Broadway, Borough of Manhattan, City, County and State of New York.

WITNESSETH: THE HON. ELLIS J. STALEY, one of the Justices of the Supreme Court in the

Third Judicial District of the State of New York, this 8th day of March, 1935, at the County Court House, in the County of Albany, State of New York.

By the Court

JOHN A. KNOX,
Clerk.

CLARK, CARR & ELLIS,
Attorneys for Petitioner-Relator,
120 Broadway,
New York, N. Y.

The foregoing writ is hereby allowed, this 8th day of March, 1935.

ELLIS J. STALEY,
Justice of the Supreme Court
of the State of New York.

Service admitted March 13, 1935, State Tax Commission, by Seth T. Cole, Deputy Commissioner.

88 **Return to Writ of Certiorari.**

SUPREME COURT,

ALBANY COUNTY.

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY,
Relator,
against
89 MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York,
Defendants.

The above named defendants, obedient to an order of certiorari herein, granted by Mr. Justice Ellis J. Staley on the 8th day of March, 1935, hereby make return thereto consisting of all and singular, the proceedings, decision and actions of the State Tax Commission had and made in the premises, the records of the pro-
90 ceedings had upon the hearing in this matter, including all papers and affidavits submitted thereon, and all and singular other matters material to the determination, assessment and collection of the assessment of income tax to be reviewed herein as follows:

(1) New York State Income Tax Non-Resident Return for the calendar year 1929, filed by C. Handasyde Whitney; amount of tax $283; verified March 21, 1933.

(2) Claim for credit against income tax due by non-resident indicating balance of tax due $181.82; filed by C. Handasyde Whitney; verified March 21, 1933.

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(3) Claim for refund of income taxes erroneously paid or illegally collected; amount of refund claim $181.82, filed by C. Handasyde Whitney, verified March 21, 1933.

(4) Notice of additional assessment of income tax, Notice No. 567511, dated May 5, 1933; amount $98.18.

(5) Additional claim for refund of income taxes erroneously paid or illegally collected, filed by C. Handasyde Whitney, verified April 92
20, 1933; amount of refund claim $98.18.

(6) Transcript of hearing before Roy H. Palmer, Assistant Director, Income Tax Bureau, at 30 State Street, Boston, Mass., Wednesday, June 13, 1934, including Exhibits A, B and C introduced in evidence at such hearing.

(7) Affidavit of C. Handasyde Whitney, verified the 2nd day of August, 1934.

(8) Determination of the State Tax Commission, bearing date December 10, 1934.

Defendants deny each and every allegation 93
contained in the petition herein, except in so far as the same is shown to be true by this return.

Defendants respectfully allege that the taxes imposed upon the relator herein were justly and legally imposed pursuant to the laws of the State of New York.

In Witness Whereof, The State Tax Commission hereunto sets its hand and seal this 27th day of March, 1935.

STATE TAX COMMISSION,
By

President.

JOHN J. MERRILL,
Commissioner.

JOHN P. HENNESSEY,
Commissioner.

Form 383. Page 1 of Return

# NEW YORK STATE INCOME TAX NON-RESIDENT RETURN

For the Calendar Year ~~1932~~ 1929 or Fiscal Period

Begun January 1, 1929

and Ended December 31, 1929 ~~193~~

~~1932~~

Do not write in these spaces
Amount Paid
$
Cashier's Stamp
No.

To be used by individuals, NOT residents of the State of New York, deriving income from:
(a) property situated within the State of New York;
(b) a business, trade, profession or occupation carried on within the State of New York;
(c) services rendered within the State of New York.

Do not write in these two spaces

PRINT NAME AND RESIDENCE ADDRESS PLAINLY BELOW

NAME C. HANDASYDE WHITNEY
(First name in full—middle initial—last name in full)

RESIDENCE ADDRESS (No.) 344 Beacon Street, Boston, Mass.
(Street or avenue or rural route)

(City, Village, Post Office and State)

FILE AT OFFICE OF THE NEW YORK STATE INCOME TAX BUREAU, STATE OFFICE BUILDING, ALBANY, N. Y., OR AT ANY DISTRICT OFFICE, ON OR BEFORE APRIL 15, 1933

READ INSTRUCTIONS CAREFULLY BEFORE PREPARING YOUR RETURN

ANSWER QUESTIONS 1—8a IN FULL

ATTACH REMITTANCE HERE

1. Did you file a N. Y. State return for 1930? no 1931? no
1a. If so, give any address other than that above used on such returns ---- (The taxpayer has never done any
2. If no return for 1931 was filed, state reasons (business nor owned any property in N.Y. and files this return UNDER PROTEST & as to one item only
3. Is this a joint return of the income of husband and wife? no
4. If not, and your wife (or husband) filed a separate return, give name and address on such return ----------
5. Were you married and living with wife (or husband) on the last day of your taxable year? yes
6. If not, were you on the last day of your taxable year the "head of a family" as defined in Instruction F? ----
7. If your status with respect to Questions 5 and 6 changed during the year, state the date of such change no change
8. How many dependent persons (other than husband or wife) under eighteen years of age, or mentally or physically defective, were receiving their chief support from you on the last day of your taxable year? none
8a. What is the relationship to you of the dependent persons for whose support you claim exemption under Questions 6 and 8? ----

NOTE.—*If your wife (or husband) or dependent minor children derived any income from sources within the State of New York, it must be included in this or in a separate return.*

## CALCULATION OF TAX

| | | |
|---|---|---|
| 9. Net income shown by Item 30 (Page 2 of Return) | $23150 | 00 |
| 10. *Less* personal exemption (See Instruction F) | 4000 | 00 |
| 11. BALANCE SUBJECT TO TAX | $19150 | 00 |

| Amount of income taxable at each rate | Rate of Tax | Amount of tax | If any tax has been withheld at source from your compensation, fill in this column | Amount |
|---|---|---|---|---|
| $ 10,000 | 12. 1% on first $10,000 of Item 11 | $ 100 00 | 16. Total tax (*Item 15*) | $ 283 00 |
| 9,150 | 13. 2% on next $40,000 of Item 11 | 183 00 | 17. *Less* tax withheld at source | none |
| | 14. 6% on amount over $50,000 of Item 11 | none | | |
| $ | 15. TOTAL | $ | 18. Balance due (*Item 16 minus Item 17*)* | $ 283 00 |

*If Item 17 exceeds Item 16 this return will be considered as a claim for refund. No other or further claim need be filed.

**The total tax due may be paid in full at the time this return is filed, or, it may be paid in three installments, one-half thereof to be paid at the time of filing, one-quarter within three months, and one-quarter within six months from the original due date.**

**Make checks or money orders payable to State Tax Commission. (Do not send currency by mail. Postage stamps will not be accepted in payment of tax.)**

AFFIDAVIT

STATE OF MASSACHUSETTS COUNTY OF SUFFOLK, ss.:

I swear (or affirm) that to the best of my knowledge and belief, the statements contained in this return including the accompanying schedules and statements (if any) are true, and that this return is a true and complete statement, in accordance with the law and regulations, of all income, gains and profits received by or accrued to me (or the person for whom this return is made) during the taxable year 1932, from sources within the State of New York, and that all deductions entered or claimed herein are allowable under the law and regulations.

Sworn to and subscribed before me this 21st day of March, 1933.

Marcien Jenckes Notary Public

THIS RETURN IS FILED UNDER PROTEST
C. HANDASYDE WHITNEY
(Signature of individual or agent)

(Signature of officer administering oath) (Title) (Address)

**19. INCOME FROM PERSONAL SERVICES** (Salaries, Wages, Fees, Commissions, Bonuses, etc.)

*Show the gross amount received or accrued. If deductions therefrom are claimed, report them under Item 28.*

*If you received compensation for services rendered partly within and partly without the State, explain in Schedule D, page 4 of return, the basis on which you apportion your income.*

*Do not include compensation received as an officer or employee of the United States.*

*Include earnings of wife (or husband) and dependent minor children from sources within the State unless reported in separate returns.*

| (a) OCCUPATION | (b) NAME AND ADDRESS OF EMPLOYER | FROM SOURCES WITHIN THE STATE OF NEW YORK |
|---|---|---|
| | | $ |
| | | NONE |

**20. INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS**

*If apportionment is required, use the basis shown in the return of the partnership or fiduciary.*

*Give name and address of partnership, estate or trust. If estate or trust, give also name and address of fiduciary.*

(a) Whitney & Elwell — $ 23,150 00

(b)

**21. INCOME FROM BUSINESS OR PROFESSION** (Including Farming.) See Instruction 21.

*Enter here your net income from business or profession, Item 30 of Schedule A. Net income (or loss) from farming operations as computed on Farm Schedule, (Form 207), or other schedule used in lieu thereof, should be entered here, and such schedule attached to this return.*

Net income from business or profession, as shown on Schedule A, or on farm schedule hereto attached — $ NONE

*(If a loss, enter in red ink and subtract.)*

**22. INCOME FROM RENTS From Property Situated Within the State of New York**

| (a) KIND OF PROPERTY AND LOCATION | (b) GROSS AMOUNT OF RENTS | (c) REPAIRS, DEPRECIATION AND DEPLETION (*explain in Schedule B*) | (d) TAXES | (e) INTEREST AND OTHER EXPENSES (*explain principal items in Schedule C*) | |
|---|---|---|---|---|---|
| | $ | $ | $ | $ | |
| | | | | | |
| | | | | | |
| (f) NET INCOME FROM RENTS (Column b, less total of columns c, d and e). *If net loss, enter in red ink and subtract.* | $ | $ | $ | $ | $ NONE |

**23. PROFIT (OR LOSS) FROM SALE OR EXCHANGE OF LANDS, BUILDINGS AND OTHER PROPERTY SITUATED IN NEW YORK STATE (Not dealt in as a business)**

*If more than one sale or exchange was effected during the year, submit separate statement in similar form for each sale and enter total net profit (or net loss) opposite 16 of this Item.*

*In the case of property acquired prior to January 1, 1919, give all the information called for by both Columns 1 and 2; if acquired subsequent to January 1, 1919, give only the information called for in Column 1.*

(1) Kind of property ..... (2) Location ..... (3) Year acquired — x x x x

(4) SALE PRICE (OR FAIR MARKET VALUE OF PROPERTY RECEIVED IN EXCHANGE) ..... $

| COLUMN 1 | | COLUMN 2 | |
|---|---|---|---|
| (5) Original purchase price | $ | (10) Exchange value January 1, 1919 | $ |
| (6) *Add* permanent improvements since purchase | | (11) *Add* permanent improvements since January 1, 1919 | |
| (7) Total | $ | (12) Total | $ |
| (8) *Deduct* depreciation since purchase | | (13) *Deduct* depreciation since January 1, 1919 | |
| (9) Cost (line 7 less line 8) | $ | (14) Adjusted January 1, 1919 value (line 12 less line 13) | $ |

(15) (a) If Item 4 is higher than both Item 9 and Item 14, insert here the higher of Items 9 and 14 — $

(b) If Item 4 is lower than both Item 9 and Item 14, insert here the lower of Items 9 and 14

*Note: If Item 4 is neither higher nor lower than both Items 9 and 14, enter "none" and report no Gain or Loss at Item 16.*

(16) Gain or loss (difference between Items 4 and 15) — $ NONE

**24. OTHER INCOME From Sources Within the State of New York** (Describe each source separately and in full)

*Explain in Schedule D, page 4 of return, apportionment, if any to made, to State of New York, of income from any source, both within and without the State.*

(a) — $ NONE

(b) — NONE

**25. TOTAL INCOME FROM ABOVE SOURCES** (*Items 19 to 24 inclusive*) — $ 23,150 00

**26. DEDUCTIONS not claimed above**

*See Instruction 26.*

*Deductions allowable to a nonresident are limited to expenses incurred in connection with the production of taxable income from sources within the State and losses from business carried on or property owned within the State.*

(a) — $

(b)

(c)

(d)

**27. TOTAL DEDUCTIONS** (except contributions) — $ NONE

**28. BALANCE** (Item 25 minus Item 27) — $ 23,150 00

**29. CONTRIBUTIONS** (See Instruction 29.) These must not exceed 15% of Item 28. Submit details on Schedule F, page 4 of return — NONE

**30. NET INCOME SUBJECT TO TAX** (Item 28 minus Item 29.) *Enter on page 1, Item 9* — $ 23,150 00

## Income from business or profession carried on wholly or partly within the State of New York

*(Income from farming may be detailed on Farm Schedule (Form 207), or other separate farm schedule to be attached to this return.)*

If the business is carried on both within and without the State (as defined in the regulations) report the total income from the business, and exhibit apportionment in Schedule G.

1. (a) Kind of business ..... (b) Business address .....
   (c) Date when business was begun
2. State whether cash or accrual basis is used .....
3. If inventories are used, state if (a) at cost or (b) at cost or market, whichever is lower. .....

*Taxpayers may submit statements attached hereto, in the form in which their books are kept, giving no less details than called for herein, and enter the net income (or loss) below.*

### TRADING OR OPERATING INCOME

4. TOTAL SALES AND INCOME FROM BUSINESS OR PROFESSIONAL SERVICES ..... $

| COST OF GOODS SOLD | | OTHER BUSINESS DEDUCTIONS | |
|---|---|---|---|
| 5. Labor | $ | 13. Amount withdrawn by taxpayer or paid to wife or minor children (*Report as income at Item 19, page 2*) | $ |
| 6. Materials and supplies | | 13a. Salaries and wages not reported under "Cost of Goods Sold" | |
| 7. Merchandise purchased | | 14. Rent for business property | |
| 8. Other costs | | 15. Interest on business indebtedness to others | |
| 9. *Plus* inventories at beginning of year | | 16. Taxes on business and business property | |
| | | 17. Repairs, depreciation and depletion (*explain in Schedule B—below*) | |
| 10. TOTAL | $ | 18. Losses not compensated by insurance (*explain in Schedule C—below*) | |
| | | 19. Bad debts (*explain in Schedule C—below*) | |
| 11. *Less* inventories at end of year | | 20. Other expenses (*explain principal items in Schedule C—below*) | |
| 12. COST OF GOODS SOLD (Item 10 minus Item 11) | $ | 21. TOTAL OTHER BUSINESS DEDUCTIONS | $ |

NONE

22. COST OF GOODS SOLD PLUS TOTAL OTHER BUSINESS DEDUCTIONS (Item 12 plus Item 21) ..... $
23. NET TRADING OR OPERATING INCOME FROM BUSINESS OR PROFESSION (Item 4 minus Item 22) ..... $

### NON-OPERATING INCOME OF THE BUSINESS OR PROFESSION

*Do not include income from rents, or profits from the sale of lands and other property (not dealt in as a business) which must be reported on page 2 of Return at Items 22 and 23.*

24. Interest ..... $
25. Dividends from stocks carried as business assets .....
26. Profit from the sale of stocks or bonds, not dealt in as a business, but carried as business assets. If you sold stocks or bonds thus held apply for Form 328. See also Instruction 21, Item 26
27.
28.
29.
30. TOTAL NET INCOME FROM BUSINESS OR PROFESSION ..... $

If you carry on business (as defined in the regulations) **only** within the State of New York, enter the amount of Item 30 of Schedule A, at Item 21 on page 2 of return.

If you carry on business (as defined in the regulations) **both** within and without the State of New York, fill in Schedules F and G on page 4 of return and enter at Item 21 on page 2 of return, the proportion of your income allocated to the State of New York.

## SCHEDULE B

**Details of deductions for repairs, depreciation and depletion in Item 17 of Schedule A, and Item 22 (c) on page 2 of return**

*If the property was acquired after January 1, 1919, base depreciation on the cost thereof. If acquired prior to January 1, 1919 show both original cost and fair market value as of that date and base depreciation on the January 1, 1919 value.*

| 1. REFER TO ITEM NO. | 2. KIND OF PROPERTY (*Principal material of which constructed*) AND LOCATION | 3. YEAR ACQUIRED | 4. COST (*exclusive of land*) IF ACQUIRED PRIOR TO JANUARY 1, 1919, STATE BOTH | 5. VALUE ON JANUARY 1, 1919 (*exclusive of land*) | DEPRECIATION AND DEPLETION CHARGED OFF 6. RATE | 7. AMOUNT SINCE PURCHASE | 8. AMOUNT FOR TAXABLE YEAR 1932 | 9. INCIDENTAL REPAIRS NOT INCLUDED IN DEPRECIATION DEDUCTIONS |
|---|---|---|---|---|---|---|---|---|
| | | | $ | $ | | $ | $ | $ |
| | TOTALS | | $ | $ | | $ | $ | $ |

NONE

## SCHEDULE C

**Details of deductions claimed in Items 18, 19 and 20 of Schedule A, and Item 22 (c) on page 2 of return**

| 1. REFER TO ITEM NO. | EXPLANATION | 3. AMOUNT | 4. REFER TO ITEM NO. | 5. EXPLANATION | 6. AMOUNT |
|---|---|---|---|---|---|
| | | $ | | | $ |

NONE

## SCHEDULE D

**Details of basis used in apportioning income, if any, earned partly within and partly without the State of New York.**

| 1. Refer to Item of return | 2. Explanation |
|---|---|
| | The only income reported is that received through my firm on account of the sale of a New York Stock Exchange seat "right". |

## SCHEDULE E

**Details of contributions to the State of New York, or any political subdivision thereof, for exclusively public purposes; or to charitable, religious, scientific and educational corporations, incorporated by, or associations organized under, the laws of the State of New York claimed as deduction at Item 29 on page 2 of return.**

| 1. NAME AND ADDRESS OF ORGANIZATION | 2. AMOUNT | 3. NAME AND ADDRESS OF ORGANIZATION | 4. AMOUNT |
|---|---|---|---|
| | $ None | | $ |

## SCHEDULE F

**If you carry on business (as defined in the regulations) both within and without the State of New York, give list of all places, both within and without the state, where you carry on business.**

| Line No. | 1. STREET ADDRESS | 2. CITY AND STATE | 3. DESCRIPTION (Branch office, agency, factory, etc.) |
|---|---|---|---|
| 1 | My only place of business is | | |
| 2 | 30 State Street | Boston, Mass. | |
| 3 | | | |
| 4 | | | |
| 5 | | | |

## SCHEDULE G

**Allocation of factors used in apportionment of income, in accordance with method prescribed in Article 457 of the New York State Income Tax Regulations.**

*To be submitted only by nonresidents carrying on business (as defined in the regulations) both within and without the State of New York*

| Line No. | 1. DESCRIPTION OF ITEMS USED AS FACTORS | 2. TOTALS (Within and without the State) | 3. NEW YORK STATE AMOUNTS |
|---|---|---|---|
| 1 | (1) VALUE OF THE REAL AND TANGIBLE PERSONAL PROPERTY OF THE BUSINESS | XXX XXX XXX XX | XXX XXX XXX XX |
| 2 | (a) At the beginning of the period covered by the return | $ | $ |
| 3 | (b) At the end of the period covered by the return | | |
| 4 | TOTAL OF LINES 2 AND 3 | $ | $ |
| 5 | AVERAGE—[half of amounts on line 4] None | $ | $ |
| 6 | (2) WAGES, SALARIES AND OTHER PERSONAL SERVICE COMPENSATION PAID DURING THE YEAR | | |
| 7 | (3) GROSS SALES OF MERCHANDISE, OR CHARGES FOR SERVICES, DURING THE YEAR | | |
| 8 | TOTALS | $ | $ |
| 9 | Enter the percentage which the total (line 8) of Column 3 is of the total of Column 2 ... % | Apply this percentage to Item 30 of Schedule A and enter at Item 21 on page 2 of Return. | |

This Space for Office Use Only

**Audited By**

.....

Form IT 112. 3-7-33-3000 (2-4000)

NEW YORK STATE INCOME TAX

# CLAIM FOR CREDIT

## AGAINST INCOME TAX DUE TO STATE OF NEW YORK BY A NONRESIDENT INDIVIDUAL FOR TAXES PAID OR DUE TO THE STATE OR COUNTRY OF HIS RESIDENCE FOR THE YEAR 19.....

RECEIVING STAMP

THIS CLAIM SHOULD BE ATTACHED TO RETURN FILED BY CLAIMANT

NAME

C. HANDASYDE WHITNEY

(First name in full — middle initials — last name in full)

RESIDENCE ADDRESS

(No.) 344 Beacon Street (Street or avenue or rural route)

(City or town) Boston (State) Mass.

Name and address should be identical with name and address on return

## IMPORTANT

**A copy of return of income to State where claimant resides MUST be filed herewith for proper audit of claim**

### STATEMENT OF CLAIM

1 Claimant is a resident of State of Massachusetts

2 The following items were included in the return of income to the State where the claimant resides and were also included in the return of income on Form 203 filed with the New York State Tax Commission.

| | | |
|---|---|---|
| Interest in profit on sale of right accruing on seat on the New York Stock Exchange owned by the firm of | $ | |
| Whitney & Elwell and standing in the name of C.Handasyde | $ | 23,150.00 |
| 3 Amount of tax paid or payable to State where claimant resides ... Whitney | $ | 101.18 |

4 Other information The tax paid was at the rate of 3% but there were authorized deductions from the above item of profit leaving tax payable on only $3,372.58

| | |
|---|---|
| 5 Total amount of tax payable to New York State (Form 203) | $283.00 |
| 6 Amount of credit claimed | $101.18 |
| 7 Balance of tax due New York State | $181.82 |

AFFIDAVIT State of Massachusetts County of Suffolk ss:

I swear (or affirm) that to the best of my knowledge and belief the statements made above in support of my claim for credit are true and complete.

Sworn to and subscribed before me this 21st day of March 1933.

C. Handasyde Whitney

(Signature of individual or agent)

Marcien Jenckes (Signature of officer administering oath) (Seal not required)

Notary Public (Title)

(Address of agent)

### PROVISIONS OF STATE INCOME TAX REGULATIONS RELATING TO CREDIT FOR TAXES

ALLOWANCE OF DEDUCTIONS AND CREDIT

ARTICLE 482. *Credit for taxes.*—A taxpayer not a resident of the State of New York who has become liable to income tax to the state or country wherein he resides, upon his net income for the taxable year derived from sources within the State of New York shall be credited with such proportion of the tax payable by him to the state or country wherein he resides as his income subject to taxation under the New York State Income Tax Law bears to his entire income upon which the tax so payable to such other state or country was imposed; provided only if the laws of such state or country grant a substantially similar credit to residents of New York State subject to income tax under such laws, or impose a tax upon the personal incomes of its residents derived from sources in this State and exempt from taxation the personal incomes of residents of New York State. (*Tax Law, section 363.*)

Amount of "taxes payable" means taxes only (no credit being given for amounts representing interest or penalties) paid or accrued during the taxable year on behalf of the individual claiming credit. "Other state or country" includes within its meaning territories, possessions, states and any foreign sovereignty.

ARTICLE 483. *Conditions of allowance of credit.*—When credit is sought for income taxes paid to other states or countries pursuant to the Tax Law, Section 363 (see *Article 482*) the income tax return form of the individual must be carefully filled out with all the information called for therein and there must be attached to and filed with the return a claim for credit (Form 112) upon which all the information called for must be given. When the Tax Commission receives proof that any other state or country allows a substantially similar credit, or imposes no tax upon and with respect to personal incomes of residents of this State within the meaning of Section 363 of the Tax Law, that fact will be announced from time to time by amendment to this article.

Since the commonwealth of Massachusetts and the State of Delaware in imposing their respective income taxes, impose no tax upon residents of this State with respect to personal income received from sources within their jurisdictions, residents of Massachusetts and residents of Delaware are allowed the credit provided for in section 363 of the Tax Law against any tax due from such residents to the State of New York.

ARTICLE 484. *Redetermination of tax when credit proves incorrect.*—In case credit has been taken and allowed for taxes accrued, or a proportionate share thereof, and the amount that is actually paid on account of such taxes, or a proportionate share thereof, is not the same as the amount of such credit, or in case any tax payment credited is refunded in whole or in part the taxpayer shall immediately notify the Tax Commission. The Tax Commission will thereupon redetermine the amount of the income tax of such taxpayer for the year or years for which such incorrect credit was granted. The amount of tax, if any, due upon such redetermination shall be paid by the taxpayer upon notice and demand by the Tax Commission. The amount of tax, if any, shown by such redetermination to have been overpaid shall be immediately refunded to him. (*Tax Law, section 377 and article 471-474.*)

**Exhibit 3 of Return.** 109

CLAIM FOR REFUND

INCOME TAXES

Erroneously Paid or Illegally Collected

This claim should be forwarded to New York State Income Tax Bureau, State Office Building, Albany, N. Y.

State of Massachusetts, Year 1929
County of Suffolk, ss: 110

Print Name of Claimant C. Handasyde Whitney
(This should agree with name on return)
Address 344 Beacon Street, Boston, Mass.

The deponent, being duly sworn, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete.

1. Year for which claim is made 1929.
2. Amount of Refund now claimed $181.82. 111
3. Amount of Tax paid $181.82.

Deponent verily believes that the amount stated in Item 2 should be refunded and now asks and demands refund of said amount for the following reasons:

(1) The taxpayer is a resident of Massachusetts and has never carried on any trade, business, profession or occupation in New York;

(2) The taxpayer has never owned any property in New York;

(3) The taxpayer, either individually or as a

112 *Exhibit 3 of Return*

member of a partnership, has never had a place of business in New York State;

(4) The membership in the New York Stock Exchange owned by the taxpayer and his partners was not property owned by him or his partners in the State of New York;

(5) The taxation by the State of New York of the taxpayer's interest in the sale of a "right" accruing on membership in the New York Stock
113 Exchange owned by the taxpayer and his partners is illegal, void and contrary to law and particularly in violation of the Fourteenth Amendment to the Constitution of the United States of America;

(6) The provisions of the Constitution of the United States of America as amended prevent the assessment against the taxpayer of the tax assessed and paid under protest:

5. Deponent further alleges that no claim has heretofore been presented for the refunding of the whole or any part of the amount stated in
114 Item 2, and that no part has heretofore been refunded to claimant.

C. HANDASYDE WHITNEY
(Name)

Sworn to and subscribed before me this
21st day of March, 1933.
Marcien Jenckes,
(Name)
Notary Public.
(Title)

**Exhibit 4 of Return.** 115

COPY

NEW YORK STATE-DEPARTMENT OF TAXATION AND FINANCE

INCOME TAX BUREAU

Notice of Additional Assessment of Income Tax

No. 567511

Albany, N. Y.
Date May 5, 1933 116

C. Handasyde Whitney, (71762)
344 Beacon St.,
Boston, Mass.

YOU MAY KEEP THIS NOTICE

Payment must be made within ten days.

The audit of your State income tax return for 1929 discloses additional tax due from you as stated below.

117

| Explanation: | Amount of tax due |
|---|---|
| Additional tax from disallowance of credit claimed as per Form 112—no tax having been paid to the State of Massachusetts upon the sale of the New York Stock Exchange Right. | |
| Paid Check Attached | $98.18 |
| RD/MMcK | |

118 *Exhibit 4 of Return*

If not paid within ten days from date hereof there shall be added to the amount of this assessment 5% thereof, and in addition, interest at 1% per month for each month or fraction of a month from the date of this notice. (See Tax Law, Sec. 377, Subdiv. 3.)

The foregoing tax is hereby assessed as indicated herein.

THE STATE TAX COMMISSION

119 Payment may be made at any office of the New York State Income Tax Bureau.

Make checks payable to the State Tax Commission.

120

**Exhibit 5 of Return.** 121

COPY

Additional

CLAIM FOR REFUND

INCOME TAXES

Erroneously Paid or Illegally Collected

This claim should be forwarded to New York State Income Tax Bureau, State Office Building, Albany, N. Y. 122

(Receiving Stamp): Received New York State Income Tax Bureau April 21 1933 Albany Office

State of Massachusetts, Year 1929
County of Suffolk, ss:

Print Name of Claimant C. Handasyde Whitney
(This should agree with name on return)
Address 344 Beacon Street
Boston, Mass.

The deponent, being duly sworn, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete. 123

1. Year for which claim is made 1929.

2. Amount of Refund now claimed $98.18.

3. Amount of Tax paid $98.18.

Deponent verily believes that the amount stated in Item 2 should be refunded and now

124 *Exhibit 5 of Return*

asks and demands refund of said amount for the following reasons:

(1) The taxpayer is a resident of Massachusetts and has never carried on any trade, business, profession or occupation in New York;

(2) The taxpayer has never owned any property in New York;

(3) The taxpayer, either individually or as a member of a partnership, has never had a place
125 of business in New York State;

(4) The membership in the New York Stock Exchange owned by the taxpayer and his partners was not property owned by him or his partners in the State of New York.

(5) The taxation by the State of New York of the taxpayer's interest in the sale of a "right" accruing on membership in the New York Stock Exchange owned by the taxpayer and his partners is illegal, void and contrary to law and particularly in violation of the Fourteenth Amendment to the Constitution of the
126 United States of America;

(6) The provisions of the Constitution of the United States of America as amended prevent the assessment against the taxpayer of the tax assessed and paid under protest.

(7) Deponent further alleges that no claim has heretofore been presented for the refunding of the whole or any part of the amount stated in Item 2 and that no part has heretofore been refunded to claimant.

(8) Claim for refund of $181.82 being tax

*Exhibit 5 of Return*

paid in March of 1933, has been filed on the above outlined grounds. This additional claim for refund is filed in connection with the same tax but on account of additional amount of tax set forth herein but paid subsequent to the original payment of March 21, 1933 in accordance with letter from Messrs. Choate, Hall & Stewart dated April 20, 1933.

C. HANDASYDE WHITNEY
(Name)

Sworn to and subscribed before me this
20th day of April, 1933.

Marcien Jenckes
(Name)
Notary Public.
(Title)

130 **Exhibit 6 of Return.**

Minutes

STATE OF NEW YORK

STATE TAX COMMISSIONER—INCOME TAX BUREAU.

IN THE MATTER

of

131 Application of C. HANDASYDE WHITNEY for revision and readjustment of personal income taxes assessed for the year 1929.

Hearing before Roy H. Palmer, Assistant Director, Income Tax Bureau, at 30 State Street, Boston, Massachusetts, on Wednesday, June 13, 1934, commencing at 3 P. M.

132 Appearance:

Marcien Jenckes, Esq., for applicant.

*Stipulation.*

It is hereby stipulated that the petitioner herein waives the formal hearing provided under Section 374 of the New York State tax law, and stipulates that the testimony and record taken herein shall be of the same force and effect as though taken in a formal hearing before the State Tax Commission, and shall become the basis for a formal determination of the Commission under Section 374.

*Exhibit 6 of Return* 133

It is further agreed that the New York Stock Exchange is a voluntary association which consisted of 1,100 members for some time prior to 1929; that about March 1, 1929, by proper resolutions of the association members, the membership was increased twenty-five per cent to 1,375; that the holder of a membership became entitled, in addition to his membership, to a so-called right for one-quarter of a new membership, four of said rights together entitled the holders to one of the new memberships; that a membership or seat in the New York Stock Exchange carries with it valuable privileges and has a market value for the purpose of sale; that the New York Stock Exchange is an unincorporated voluntary association, limited as to membership, governed by its own constitution, by-laws and rules; that such association holds the beneficial ownership of the entire capital stock of a New York corporation which owns the building in which the business of the Exchange is transacted, with the land upon which it stands and which is situated in the City and State of New York; that a member may personally buy or sell only in the Exchange building; that a member of the Exchange may buy or sell for the account of other members at a commission substantially less than that charged to a non-member; that such rights and privileges are valuable and are exercisable only in transactions conducted at the New York Stock Exchange building in the City and State of New York.

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135

136 *Exhibit 6 of Return*

C. HANDASYDE WHITNEY, having been duly sworn by said Assistant Director, testified in answer to questions by Mr. Jenckes, as follows:

Q. What is your full name, Mr. Whitney? A. Charles Handasyde Whitney.

Q. And you live in Boston? A. I live in Boston.

Q. How long have you lived in Boston? A. Practically all of my life.

137 Q. Have you ever had a domicile anywhere else than in Massachusetts? A. No.

Q. Have you had any place of business or domicile in the State of New York? A. No.

Q. What is your business, Mr. Whitney? A. Stock broker.

Q. You are a member of the firm of Whitney & Elwell? A. Yes.

Q. With offices at 30 State Street, Boston? A. Yes.

Q. Who are your partners? A. William D. Elwell, Geoffrey G. Whitney—

138 Q. Who is your brother? A. My brother, yes. —J. Chester Hutchinson, and Ernest H. Freeman.

Q. Was Mr. Freeman a partner in 1929? A. No.

Q. So that the only partners in 1929 were yourself, your brother, Mr. Hutchinson, and Mr. Elwell? A. Yes.

Q. What is the business of your partnership, Mr. Whitney? A. Buying and selling securities on commission. General brokerage business.

Q. And your firm advertises itself, does it not, as a member of the New York Stock Exchange? A. Yes.

139 Q. You are the person in whose name the membership stands? A. Yes.

Q. When did you become the owner of the membership of the New York Stock Exchange? A. In March, 1909.

Q. What did you pay for the seat at that time, Mr. Whitney? A. $77,000.

Q. Was that membership on the New York Stock Exchange in 1929 owned by you entirely? A. No, it was a firm asset.

140 Q. In what proportion was the New York Stock Exchange seat owned by you? A. Divided evenly amongst the four partners. 25 per cent each.

Q. Where does your brother live? A. In Milton.

Q. Where does Mr. Hutchinson live? A. In Lexington.

Q. Where does Mr. Elwell live? A. Arlington.

Q. And they have all been partners connected with the firm since 1909? A. Yes.

141 Q. Have they, or any of them, had any business— A. Excuse me one minute. I think Mr. Hutchinson may have come in, and my brother, just shortly after that. It may have been 1910.

Q. But since the year 1909 or 1910— A. It was very shortly afterwards. Essentially from then on.

Q. Certainly since the beginning of the year 1911? A. Oh, yes.

Q. You have been the four partners there? A. Yes.

Q. Have any of your partners at any time had any domicile in New York State, Mr. Whitney? A. No.

142 *Exhibit 6 of Return*

Q. Or have they individually or as a firm even done any business in New York State? A. No.

Q. In 1929, Mr. Whitney, I believe the New York Stock Exchange issued rights to the members of the Exchange who were at that time the record owners of the memberships on the Exchange? A. Yes, that is correct.

Q. And you received such a right? A. Yes.

Q. How many rights did it take to become
143 entitled to a new membership? A. It took four rights. Well, whether it is four in all or four and the other one I can't seem to remember. Have you the memorandum there?

Q. Yes, I am showing it to you (handing). Refreshing your recollection from this memorandum, is it correct that the rights attached to four memberships, when combined together, entitled the owners of those four rights to one new membership? A. That is it; four.

Q. So that the membership of the Exchange was increased 25 per cent? A. Yes, I remember that. 375 members.

144 Q. An increase of 275? A. 275 in all, yes. Yes, it took four rights combined to make one membership.

Q. The right attaching to your membership was sold in 1929, was it not, Mr. Whitney? A. Yes.

Q. For how much? A. $108,000.

Q. Your firm never had any office in New York State, did it? A. No.

Q. In the course of your business as a general securities and commission business, does your firm buy and sell securities on the Boston market and execute orders on that market, on

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the Boston Stock Exchange, where certain stocks listed on the New York Stock Exchange are also traded in? A. Yes.

Q. Do you also take orders for execution on the New York Stock Exchange? A. Yes.

Q. And that constitutes a considerable portion of your business, does it? A. Yes.

Q. How are those orders executed, Mr. Whitney? A. Those are transmitted to our correspondent in New York over the wire, and they executed the orders for us in our name. Our

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name does not appear except on their books.

Q. When you said execute the orders for you, you mean they go to the floor of the New York Stock Exchange and actually buy and sell securities as ordered by you? A. Yes.

Q. In that transaction of purchase or sale on the floor of the Exchange does your name appear? A. Oh, no.

Q. In 1929 who were your correspondents, Mr. Whitney? A. F. B. Keech & Company, Harris, Upham & Company, and E. F. Hutton & Company.

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Q. When your correspondents buy on order from you, do they do that business in their own name, Mr. Whitney? A. Yes.

Q. And do they send wire reports to you of the execution of these orders? A. Yes.

Q. And written reports which you receive the following day? A. The following day, right.

Q. Do you carry open accounts with your New York correspondents? A. We do.

Q. Those open accounts which you carry with your New York correspondents are margin accounts, where you owe them money and have securities up on the account as collateral; is that correct? A. That is correct.

148 *Exhibit 6 of Return*

Q. And as the indebtedness incurred by them in the purchase of the securities increases, you supply margin as required? A. Exactly.

Q. And the matter of margin arrangements is a matter of mutual agreement between you and your correspondents; is that correct? A. That is correct.

Q. What was the nature of the business arrangement that you had with your New York correspondents in 1929, Mr. Whitney? A. The commissions, you mean?

149 Q. No, was it a written or oral arrangement, I meant first? A. I think it was probably oral, although there may have been letters back and forth. It is quite probable that there were.

Q. You had been doing business with those particular correspondents that you mentioned for some time prior to 1929? A. Yes; oh, yes. There are undoubtedly lots of letters back and forth. We changed the arrangement from time to time, you know.

Q. In substance, Mr. Whitney, did the arrangement which you had with your New York
150 correspondents in 1929 provide as follows: A. All arrangements between brokers and wire houses are practically the same. They do not vary much.

Q. Does this paper, entitled "Customer's Agreement," bearing the firm signature of Whitney & Elwell, Mr. Whitney, in substance state the arrangements on which you carried all of the accounts which you had with your correspondents in New York in 1929? A. This is it in substance. I have seen these before, of course. (Peruses.) Yes, that is the general form.

Q. It contains, does it not, the substantive provisions which were incorporated in any oral arrangement that you had with your New York correspondents, where that oral arrangement was not confirmed in writing? A. Yes. Some of the details we usually put in writing, but this is the usual form which is used.

Mr. Palmer: What was the date of this paper that you are reading from, Mr. Whitney?

The Witness: December 4, 1929.

Q. So that you are a customer of the New York firm? A. Yes.

Q. And that is the form supplied to you by the New York house and signed at their request, is it? A. Yes.

Q. That is the way that the arrangements were made where they were not in writing? A. Yes, this is the same result.

Mr. Jenckes: I will introduce this in evidence.

Photostat copy of Customer's Agreement marked "Exhibit A."

Q. What charge do your correspondents make to your firm, Mr. Whitney, for the execution of orders in New York on the New York Stock Exchange? A. They charge me 40 per cent of the full commission.

Q. By "the full commission" what do you refer to, Mr. Whitney? A. That is the commission that we charge and they charge their customers.

Q. That is prescribed by the rules of the New York Stock Exchange, is it? A. Yes, that is right.

Q. So for any business they do for you on the New York Stock Exchange as your correspondents they get 40 per cent and you get 60 per cent? A. Yes.

Q. And the total figure by which those percentages are figured is the commission which would be charged by them to an individual customer who came to their offices in New York? A. Yes, exactly.

Q. And it is the same charge you would make or do make to an individual customer who comes to your office in Boston? A. Yes, exactly.

Q. So any member of the New York Stock Exchange who takes an order for execution on the New York Stock Exchange has to charge the commission fixed by the rules of the Exchange in connection with the selling price of the stock? A. Yes.

Q. And how is the division between you and your New York correspondents arrived at? A. That is by mutual agreement entirely. There is a limit, a minimum limit set by the Stock Exchange. That is all.

Q. By that minimum limit, you mean the New York correspondent cannot do it for less than a certain amount? A. They have to charge us a commission, which varies on the different stocks, but it is around $3.50. That would be close to about 35 per cent.

Q. Is the commission charged by your firm to your customer fixed by the rules of the Exchange? A. That is fixed by the Exchange.

Q. And is that the same amount which the New York correspondent would be obliged to charge a customer if that customer dealt di-

157

rectly with the New York correspondent? A. Exactly the same.

Q. And were these arrangements outlined in this Exhibit A, Mr. Whitney, the same as you had throughout the entire course of business of your firm from 1929 to the present date? A. Yes, I should say they were exactly the same.

Q. Are there dues to the New York Stock Exchange, Mr. Whitney? A. Yes, regular dues during the year.

Q. And those, I take it, are paid by your firm? A. They are paid by the partnership. 158

Q. Is there also a gratuity fund? A. There is a gratuity fund.

Q. And that provides, does it not, in substance, that on your death as a member your membership can be disposed of by the committee and your widow and descendants are entitled to certain payments out of a fund known as the "guaranty fund," which in substance is an insurance fund? A. It is an insurance fund.

Q. And the payments to that fund, are they made personally by you? A. They are made personally by me. 159

Q. At times, Mr. Whitney, have there been assessments by the New York Stock Exchange in the nature of capital advances made by the Stock Exchange for capital purposes? A. I believe there have.

Q. And have you determined from the New York Stock Exchange what that amounted to prior to 1929? A. That has been worked out, I believe.

Q. And do you recall what that figure was? A. Let me see. The total amount was $600.

Q. $600 represents one-fifth of the contributions, does it not, Mr. Whitney? A. Yes.

160 *Exhibit 6 of Return*

Q. And the $600 figure came in in calculating the addition to the cost of your seat by reason of those additional capital advances? A. Yes.

Q. So that the total capital contributions were $3,000? A. $3,000.

Mr. Jenckes: I do not understand, Mr. Palmer, that you raise any question about that fact, do you, in connection with the reporting of the returns?

Mr. Palmer: No.

161 Q. How is the membership in the New York Stock Exchange evidenced, Mr. Whitney? A. Merely by paying a check and signing a book.

Q. Do you get a letter or anything from the secretary of the Exchange? A. Yes, I believe we got a letter, saying you have been admitted to membership. I can't remember seeing that, but all members have a printed document stating that the firm is a member of the New York Stock Exchange.

Q. How can that membership be transferred, Mr. Whitney? A. Only through the Stock Ex-
162 change and with its approval.

Q. You have paid a tax, have you not, Mr. Whitney, to the State of New York on account of an assessment on the profit resulting from the sale of your interest in this right? A. I have.

Q. You have filed an application for refund in connection with that payment? A. I have.

Q. And is that true also of your three partners who are equally interested in the seat with you? A. Yes.

Mr. Jenckes: I think I have covered everything, Mr. Palmer.

*Exhibit 6 of Return* 163

*CROSS-EXAMINATION by Mr. Palmer:*

Q. Mr. Whitney, you stated that you were, in 1929, domiciled in Massachusetts, and that you had never been domiciled in New York State. Did you ever have a place of abode in New York State? A. No.

Q. You did not have any place of abode, in 1929, in New York State? A. No.

Q. How much time did you spend in New York City or New York State during the year 164
1929, if any? A. I do not think I have been over there, even. Well, not more than two or three days at the most. I very rarely go to New York.

Q. In the conduct of your business is it your custom, or the custom of any of your partners, to go to New York with any frequency? A. No. They come to see us as a rule.

Q. How often would you say any of your partners in 1929 visited New York on the affairs of the partnership? A. I could not say; but I should say very seldom.

Q. Was it the custom to make periodic visits 165
to New York? A. No, just when occasion called to see our correspondents.

Q. When an occasion did call, what was the nature of the business transacted in New York? A. It was merely to talk over conditions and get suggestions and really more or less of a social call, you might say.

Q. Did you give any orders to buy or sell, you or your partners, when you went to New York? A. No, that was all conducted here, from this end. It is possible somebody might have entered an order but it was reported to us, just as it is given here.

166 *Exhibit 6 of Return*

Q. Was it your custom to enter into syndicate transactions with New York houses in 1929? A. We participated or were given or allotted participations, I should say, in underwritings in 1929 to a small extent.

Q. How many, would you say? A. Oh, it is very hard to say. I would hate to make any exact statement. Perhaps ten to a dozen or more.

Q. Did you, or any of your partners, go to New York to discuss participation in these syn-
167 dicates or underwritings? A. I should say not. They notify us by letter and are very apt to call up on the telephone.

Q. You did not seek those participations? A. No, they were sent to us in the regular course of business, and we can take them or not as we want to. An underwriting house will allot to their correspondents and friends a certain number of shares in a syndicate. If you take any you may resell it to your customers.

Q. The place of business of your partnership in Boston is No. 30 State Street? A. Yes.

Q. You do a general brokerage business? A.
168 Yes.

Q. As members of the Boston Exchange? A. Yes.

Q. And of the New York Stock Exchange? A. Yes.

Q. You advertise yourselves in Boston as members of the New York Stock Exchange? A. Yes.

Q. And you accept orders from customers at your Boston office for execution on the New York Stock Exchange? A. Yes.

Q. At the time the customer places his order with you to buy or sell, does he know whether or

not you are executing that on the Exchange? A. Oh, yes, of course. There is no place else.

Q. I mean does he know whether your firm is doing it through your membership or whether some other New York Stock Exchange firm is executing the order? A. He knows that it is being done through our correspondent because we have no office there.

Q. Does your customer know that? A. I presume so.

Q. You do not tell him, do you, that you have 170
no office in New York, or that you are not actually buying or selling that stock on the Exchange? A. Well, I should say we would certainly if they asked us.

Q. But you are not generally telling your customers that beforehand, unless they do inquire? A. Well, I tell you this: If a customer asks how our orders are executed, we say we send them over to our New York correspondent, whoever it may be, and they execute the order for us. I imagine everybody knows.

Q. But if he does not inquire, why, you do not inform him? A. No, on our letterheads we 171
do not show any—

Q. Your letterheads and your signs on the doors and windows say merely "Members of the New York Stock Exchange," I assume? A. Our letterhead shows just one office, too, 30 State Street. No branches.

Q. When a customer buys or sells through you, you have him sign a customer's agreement, do you not, similar to the one which has been exhibited here as Exhibit A? A. We do not have to do that in Massachusetts.

Q. Do you not have to have the customer sign

172 *Exhibit 6 of Return*

any agreement permitting you to hypothecate his stock as collateral? A. No, not as yet.

Q. Is not that a rule of the Stock Exchange? A. No, not to my knowledge. I was trying to think. On all our orders—this has come up a great many times—on all our orders, when an order is put in, that appears on the order blank.

Q. The fact is, however, that when a customer buys on margin you do hypothecate the stock? A. Yes.

173 Q. Now, when you transmit the order to your correspondent in New York, he executes the order on the Exchange? A. Yes.

Q. You say that he does not know your customer? A. No.

Q. But he knows that you are buying for a customer, I take it? A. Well, I presume so, as we are.

Q. Now, if the stock is purchased through you by a customer, you hypothecate his stock to carry your own account with your correspondents; is that right? A. That stock is usually left over in New York on our account there. Some-

174 times it is brought over to Boston, to suit our convenience, really. Sometimes it goes into a loan; sometimes it goes right into our box. That is simply our option. We can do as we want with it.

Q. When it is purchased on margin, for instance, you have a bank balance in New York at all times? A. We have a bank balance there which is merely for the convenience of drawing a check on New York if we wish to. We very seldom do it.

Q. How much of a balance do you carry there ordinarily? I am speaking of the partnership,

175

of course. A. Yes. Well, from $5,000 to $10,000. It is very small.

Q. What percentage of the orders that you place through your New York correspondents is for customers and what for your own account, if any? A. 999 out of 1,000 are our customers.

Q. You mean in number of accounts? A. Yes. We do not speculate as a firm at all. The partners may occasionally buy stocks, as they do.

Q. During the year 1929 you were dealing with three Stock Exchange firms in New York? 176
A. Yes.

Q. Keech, Hutton and Upham? A. Harris & Upham, yes.

Q. Have you any idea what your transactions with those firms amounted to in that year? A. It would be impossible for me to say without looking it up. I really haven't the vaguest idea.

Q. What percentage of your business was represented by orders transmitted to your New York correspondents in 1929? A. As a very inaccurate guess, I should say three-quarters. It might vary.

Q. What percentage of your sales in 1929 177
were on marginal basis, let us say? I am speaking of those transmitted through New York. A. Purchases and sales?

Q. Yes. A. You understand these answers are very much of a guess. I should say nine-tenths.

Q. And in the case of that nine-tenths, assuming that is a fair estimate, would you say that in the great majority of those cases the securities purchased were held in New York by your New York correspondents as collateral? A. I can tell you a little more accurately on that. At the height of the bull market three-quarters of

178 *Exhibit 6 of Return*

our stocks were in New York. It has changed considerably since, of course. That is merely a rough guess, too.

Q. On your order confirmation slips there which you have presented it appears that your firm notified the customer, at least, that it was your understanding that you were permitted to hypothecate the securities acquired on marginal account? A. Yes.

Q. For any unpaid part of the purchase price
179 or sales price? A. Yes.

Q. Now, when you transmitted an order to New York you had to sign an agreement, did you not, with the New York firm permitting them to hypothecate any securities that you purchased through them? A. Yes.

Q. So that you, in turn, hypothecated any securities which the customer had agreed that you should hypothecate? A. Yes.

Mr. Palmer: I should like to put those in evidence, Mr. Jenckes.

Order confirmation and sale confirma-
180 tion marked Exhibit B and Exhibit C respectively.

Q. In paying your New York correspondent for any securities, I assume that that was a bookkeeping transaction at the end of each day showing a debit or a credit balance on purchases and sales; is that true? A. They merely credited, charged our open account with them.

Mr. Jenckes: For each transaction during the day. I got the impression from your question that you suggested it was all one lump transaction.

Q. No, it was either a debit or a credit for the day? A. Yes. 181

Q. There was not a check sent by you for each transaction? A. No, no, indeed.

Q. How often did you have a settlement? A. We never have any settlement unless the account is closed out. We have settled and closed up two accounts since the year of 1929.

Q. When a customer gives you an order on margin in Boston which is transmitted to New York you required, in 1929, a certain margin of the customer. Was that the same margin which 182 was required by your correspondents in New York? A. Well, practically the same. It depends a good deal on the credit of the customer and the kind of stocks he buys.

Q. In other words, did you have to carry a margin with your correspondents in New York? A. Yes, we had a minimum margin requirement, which I do not recollect, as we always carried a great deal more than was necessary there.

Q. It did not always correspond, however, with the marginal account which you had in the Boston office? A. Oh, no. It may be a great 183 deal more or a great deal less. They had a minimum requirement. It was more a man's credit—although there is a minimum requirement by the Stock Exchange at the present time.

Q. In 1929, what were the commissions charged for the purchase and sale of stocks on the New York Stock Exchange? A. Varying prices for the different prices of the stocks. I would have to give you a list. It ranged from 7 1/2 cents up to $25 or $30. There is a regular commission card which I can give you if you wish it.

184 *Exhibit 6 of Return*

Mr. Jenckes: Would you like to have that commission card set out in detail, Mr. Palmer?

Mr. Palmer: It might be helpful to have it in the record.

Q. In any event, whatever those commissions were, you were credited and received from your correspondents 40 per cent of the regular commission? A. They charged us at the rate—you can put it that way—charged at the rate of 40
185 per cent of the total commission.

Q. They charged 40 or you received 40? A. They charged 40. We received 60, and they received 40.

Q. How was that handled as between you? A. That was just an agreement.

Q. Was that entirely oral? A. I think we probably had letters on that, too.

Q. In this customer's agreement, of course, I take it that has nothing to do with your agreement as between the correspondents and yourselves as to commissions? A. No.

186 Q. The New York Stock Exchange has fixed the rates of commission for the purchase and sale of securities? A. Yes, for non-members.

Q. You charge your customers with the fixed rates? A. Yes, exactly.

Q. When you buy and sell through your correspondent, he charges you only 40 per cent of that rate? A. I might say here that the rates on odd lots are a little higher than on round lots, and they vary in that way; so that, in the case of odd lots, our percentage might be more than 60 per cent of the whole. I do not know that that has any bearing on the thing at all. Each house has a minimum they can charge but

there is no end of the maximum, of course. You could charge $10 for one share if you wanted to. You naturally would not, because you would not get any business.

Q. Under the customer's agreement, Exhibit A, which represents the agreement signed by Whitney & Elwell with Harris, Upham & Company, in paragraph 2 you constitute Harris, Upham & Company as your agents; likewise, in the third paragraph from the end of the agreement, Harris, Upham & Company are referred to as 188
"the undersigned's agent." Do you so recognize them as your agents, Mr. Whitney? A. Well, I have always recognized them as our agents for executing the orders.

Q. For the purposes as set forth in that agreement? A. Yes.

Q. Now, the 60 per cent of the commission which you charge your customer for the execution of orders can only be paid to you, under the circumstances, as a member of the New York Stock Exchange; is that not so? In other words, your correspondent would not be permitted, under the rules of the Stock Exchange, to split 189
commissions with any outside person or firm? A. No, that is correct.

Q. And it is only by virtue of your membership in the New York Stock Exchange that he charges you only 40 per cent rather than the full commission? A. That is right.

Mr. Palmer: I think that is all.

*RE-DIRECT EXAMINATION by Mr. Jenckes:*

Q. At your correspondents' offices in New

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York, Mr. Whitney, I understand that you owe them money on account of transactions which they have executed for your account, and they hold the securities purchased and others that you may send as collateral on the account? A. They do.

Q. So that there is an indebtedness that you owe in New York? A. Yes.

Q. On the accounts of correspondents over there? A. Yes, that is correct.

191 Q. So far as payment and delivery for any securities bought for your account in New York is concerned, do you have anything to do with that completion of the transaction on it? A. No, nothing whatever.

Q. In other words, the whole transaction from the execution of the order on the Exchange to the purchase and payment for the stock bought is handled in New York? A. Entirely.

Q. Did any of your partners ever have a place of abode in New York, Mr. Whitney? A. No, not to the best of my knowledge and belief. I never heard of their living there as long as I 192 have known them, since 1909. They may have been before that but I am sure they have not since.

Q. You have private wires to your New York correspondents in each case so that orders and instructions go over those wires every day? A. Yes, that is correct.

Q. Have you or any of your partners ever done any business on the floor of the New York Stock Exchange? A. No, never.

Q. So that at any time when you have been to New York, has there been any occasion for you to do anything in connection with the exe-

cution or completion of transactions which you have undertaken through your correspondents? A. None at all.

Q. With reference to participation in syndicates, to which you referred, did those participations include matters of stocks listed on the New York Stock Exchange? A. In a few cases they may have been listed.

Q. Did the participation have to do with the resale of the securities involved in the syndicate in this Commonwealth? A. It usually was a 194
further issue of some stock, either listed or unlisted, which was being syndicated in New York, and the New York syndicate allotted certain amounts to us to take or not, as we wanted.

Q. And you had the opportunity of reselling to customers in your usual line of business in Massachusetts? A. Yes.

Q. So that the purpose was your having participation for resale to customers here; is that right? A. To be merely distributors for the syndicate in New York.

Q. Mr. Whitney, are some stocks listed on the New York Stock Exchange also dealt in on the 195
Boston Stock Exchange? A. Yes.

Q. And that applies only to odd lots, does it not? A. Almost entirely odd lots.

Q. And is that approved of by the New York Stock Exchange? A. Yes, they know about it.

Q. That applies only to certain stocks that are few in number, does it not, Mr. Whitney? A. I do not know the exact number but not a great amount.

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June 15, 1934, 2:30 P. M.

Q. Mr. Whitney, have you, since last Wednesday, gotten certain other figures with reference to the approximate business done, participations in syndicates, and commission rates from your records? A. Yes.

Q. How were you able to approximate the number of New York Stock Exchange shares which you handled on commission during 1929? A. These figures are all approximate. We took
197 the total number of shares of stocks executed on the New York Stock Exchange, New York Curb, and Boston Stock Exchange, averaged over 1927, 1928 and 1929. This total, in round figures, was 4,000,000 shares average for one year. We then calculated that three-quarters of the total shares were executed through our correspondents on the New York Stock Exchange. This would amount to 3,000,000 shares, bought and sold, for one year.

Q. Did you approximate any money value involved in all of these transactions, Mr. Whitney? A. I did.
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Q. And what approximate money value did you fix, and how did you fix it? A. I took the total of 3,000,000 shares and assumed an average price of $50 per share over the three years.

Q. Is that a fair average from your knowledge of the business at that time, Mr. Whitney? A. That is merely a guess but probably perfectly fair.

Q. Then you multiplied that fifty dollar figure by the 3,000,000 shares, in order to approximate the total of the money value and arrived at $150,000,000? A. That is correct.

Q. As I understand it, most of the shares dealt in were purchased and sold on margin rather than outright purchase? A. Practically entirely.

Q. Have you checked up the number of syndicate underwriting participations which your firm had in 1929? A. Yes.

Q. And how many was that? A. This amounted to 88 different underwritings in which we participated.

Q. By that you mean 88 different securities? 200
A. Yes.

Q. At the time of these underwritings were any of these securities listed on the New York Stock Exchange? A. Probably none of them, although it is hard to determine.

Q. Were some of them listed on the Stock Exchange at or shortly after their underwriting? A. Very likely a few of them were listed after the syndicates were over.

Q. What was the schedule of commissions which were fixed by the New York Stock Exchange to be charged to non-members of the Exchange? A. The schedule is as follows: 201

| For Securities Selling | Rate per Share |
|---|---|
| Under 50 cents | 2 1/2 cents |
| At 50 cents and above, but under $1 | 3 " |
| At $1 and above, but under $10 | 7 1/2 " |
| N. Y. Curb—Selling at $1 to $5—5 cents | |
| At $10 and above, but under $25 | 12 1/2 " |
| At $25 and above, but under $50 | 15 " |
| At $50 and above, but under $75 | 17 1/2 " |
| At $75 and above, but under $100 | 20 " |
| At $100 and above, but under $200 | 25 " |

202 *Exhibit 6 of Return*

Selling at $200 and above—5 cents per share will be added for each additional $50 or fraction thereof.

Q. The commissions, Mr. Whitney, which you have given in your previous answer are the ones which had to be charged by you to your customers, or by one of your New York correspondents to a person who did business directly in their office? A. Yes.

Q. And those are the commissions on which, 203 by arrangement between you and your correspondents, the correspondents charged you 40 per cent, and you collected the whole amount from your customer, keeping 60 per cent for yourself? A. That is correct.

C. HANDASYDE WHITNEY.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss:

Mr. C. Handasyde Whitney, having been duly sworn, stated before me that he had read the foregoing testimony, signed by him, and that 204 the same was true to the best of his knowledge and belief.

RICHARD J. MARTIN,
Notary Public within and for the
Commonwealth of Massachusetts.
My commission expires Feb. 12, 1939.

**Exhibit 6 of Return Continued.** 205

(Being Exhibit A Introduced at Hearing.)

CUSTOMER'S AGREEMENT

Harris, Upham & Co.
New York N. Y. Chicago Ill.

Dear Sirs:

In respect to all accounts which the Undersigned now has, or may hereafter have with you 206
or your successors (hereinafter referred to as you) for the purchase or sale of securities or commodities, or contracts for commodities or securities, including any account as guarantor, it is understood and agreed as follows:

Only actual purchases or sales are contemplated, and all orders shall be executed subject in all respects to the regulations and usages of the New York Stock Exchange or other exchange or market where executed; and you and your correspondents are hereby constituted agents of the Undersigned for the purpose of consummating all such transactions, and are 207
authorized to make such advances and expend such moneys as may be required in respect thereof;

All securities or commodities, or contracts for commodities or securities, now held or hereafter purchased by you for, or now or hereafter deposited with you by, the Undersigned, are to be held by you, as security for all liabilities of the Undersigned to you, however and whenever arising, and you are hereby authorized, without further notice to the Undersigned, and without regard to whether you have in your possession

208 *Exhibit 6 of Return*

or subject to your control at the time thereof other securities, commodities or contracts for commodities or securities of the same kind and amount, in the usual course of business to repledge, rehypothecate (either for the amount due you from the Undersigned, or for a greater sum) and loan the same from time to time separately or together with other securities either generally or to or for account of your other customers; and you shall not be required to
209 deliver to the Undersigned the same certificates or securities deposited or received but only certificates or securities of the same kind and amount;

You may from time to time demand additional security or that any account be immediately taken up and paid, and all amounts advanced and other balances due, with interest at the current rate, and all commissions fixed by the regulations and usages of the exchange or market where orders are executed shall be due and payable upon demand;

You may employ sub-brokers and shall be re-
210 sponsible only for reasonable care in their selection, and may settle contracts and controversies according to the regulations and customs of the exchange or market where orders are executed;

Upon failure of the Undersigned to comply with any of the provisions hereof, or whenever deemed necessary for your protection, you are hereby authorized and empowered to sell, assign and deliver all or any part of the securities, commodities or contracts for commodities or securities pledged hereunder upon any exchange or market or at any public or private sale, at your option, and/or to purchase to cover short sales and without demand for margin, and with-

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out advertisement or notice of purchase or sale, which are hereby expressly waived, and no specific demand or notice shall invalidate this waiver; and after deducting all costs and expenses of purchase or of sale and delivery, including commissions, transfer and stamp taxes, to apply the residue of the proceeds to the payment of the liabilities of the Undersigned to you, returning the surplus, if any, to the Undersigned; and upon any sale other than a private sale you may purchase the whole or any part 212
thereof free from any right of redemption; and the Undersigned shall remain liable for any deficiency;

All statements of account rendered the Undersigned from time to time shall be taken to be correct unless written notice to the contrary is given you within ten days after the receipt thereof;

All statements of account, notices or demands hereunder may be made by depositing the same in writing in the United States mails directed to the Undersigned at the address given below, or any other address of the Undersigned; 213

Notices and demands may, however, be given by you by any other means of communication;

Monthly debit-balances on accounts shall be charged in accordance with your usual custom with interest at a rate which shall include the average rate paid by you on your general loans during the month covered by such balances respectively, and any extra rates caused by market stringency, together with a charge to cover your credit service and facilities;

In all transactions wherein you act as the Undersigned's agent, the Undersigned agrees to wholly indemnify and save you free and

harmless from any loss, damage or liability arising out of such transaction howsoever same may occur and the Undersigned agrees promptly to pay on demand any loss or debit-balance arising in any account of the Undersigned;

Whenever you shall elect to give Undersigned notice of intention to liquidate his account giving time and place where sale is to occur, no oral agreement on the part of any of your agents agreeing to adjournment shall be binding; all such agreements must be in writ-
215 ing;

This agreement shall pertain to all accounts from time to time closed and then reopened and including accounts from time to time closed and then reopened and shall continue until revoked by the Undersigned in writing, such revocation to affect only transactions thereafter entered into between us.

* The Undersigned hereby represents that he is of full age and sound mind, that he is not connected as a clerk or employee with the New York Stock Exchange or any other exchange,
216 nor with a member of that Exchange or any other exchange engaged in the business of dealing in securities or commodities, nor is he connected as a clerk or employee with any bank, trust company, banker or insurance company, nor with any broker, firm or corporation engaged in the business of dealing in securities or commodities.

Dated Dec. 4, 1929.

Yours truly,

WHITNEY & ELWELL,
Address Boston

In the presence of

* This clause is part of the agreement only in the case of individual customers.

Exhibit 6 of Return, cont'd.
Being Exhibit B. introduced at hearing.

Exhibit B
RJM

**WHITNEY & ELWELL**
**30 STATE STREET**
**BOSTON**

MEMBERS
NEW YORK STOCK EXCHANGE
BOSTON STOCK EXCHANGE

TEL. HUBBARD 7300

Upon your order we have this day BOUGHT for your account: BOSTON,

| QUANTITY | DESCRIPTION | PRICE | AMOUNT | COMMISSION | ODD LOT FEE | NET AMOUNT | BROKER |
|---|---|---|---|---|---|---|---|
| | | | | | | | |

IN ACCEPTING THIS CONFIRMATION THE CUSTOMER AGREES WITH WHITNEY & ELWELL:

(a) That he intends on all orders or contracts for the purchase or sale of securities that we, either personally or by agent, shall make actual purchases and sales or valid contracts therefor.
(b) That all transactions wherever executed be subject to and governed by the rules and custom of the market, exchange or board where executed and of its clearing house, if any, and members.
(c) That any and all securities held by us on the account of the customer, either alone or with other securities and up to and for more than the amount for which said securities are held by us may be pledged, repledged or loaned, with unlimited power to repledge, to other customers of ours or their agents or to other brokers, and that securities so pledged, repledged or loaned are considered within our control.
(d) That if securities which are not on deposit in the customer's account are ordered sold for his account we are authorized and requested to complete said sales and to borrow the securities for delivery on the account of the customer.
(e) That without call or notice to the customer we may close out the whole or any part of the customer's open account at public or private sale by buying or selling from or to ourselves or others.

E. & O. E.

WHITNEY & ELWELL

IF NOT CORRECT PLEASE NOTIFY US IMMEDIATELY.

PER _____

Exhibit 6 of Return, cont'd.
Being Exhibit C. introduced at hearing.

Exhibit C
RJM

**WHITNEY & ELWELL**
**30 STATE STREET**
**BOSTON**

MEMBERS
NEW YORK STOCK EXCHANGE
BOSTON STOCK EXCHANGE

TEL. HUBBARD 7300

Upon your order we have this day SOLD for your account: BOSTON,

| QUANTITY | DESCRIPTION | PRICE | AMOUNT | COMMISSION | TAX | NET AMOUNT | BROKER |
|---|---|---|---|---|---|---|---|
| | | | | | | | |

IN ACCEPTING THIS CONFIRMATION THE CUSTOMER AGREES WITH WHITNEY &

(a) That he intends on all orders or contracts for the purchase or sale of securities that we, either personally or by agent, shall make actual purchases and sales or valid contracts therefor.
(b) That all transactions wherever executed be subject to and governed by the rules and custom of the market, exchange or board where executed and of its clearing house, if any, and members.
(c) That without call or notice to the customer we may close out the whole or any part of the customer's open account at public or private sale by buying or selling from or to ourselves or others.

E. & O. E.

IF NOT CORRECT PLEASE NOTIFY US IMMEDIATELY.

PER _____

220 **Exhibit 7 of Return.**

STATE OF NEW YORK

STATE TAX COMMISSIONER—INCOME TAX BUREAU.

IN THE MATTER

of

Application of C. HANDASYDE WHITNEY for revision and readjustment of personal income taxes assessed for the year 1929.

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Affidavit of C. Handasyde Whitney with reference to the disposal of his right attaching to the New York Stock Exchange membership standing in his name.

Mr. C. Handasyde Whitney, being sworn, deposes and says:

1. On or about February 9, 1929, I was informed by the Secretary's office of the New
222 York Stock Exchange that I was entitled to one-quarter of a new membership in the New York Stock Exchange on account of any ownership of one such membership.

2. Shortly thereafter I informed the Secretary of the Exchange that my so-called right to a new one-quarter interest was for sale at a limit of $120,000.00. I authorized the Secretary to contract for the sale of such right.

3. On or about March 8, 1929, I reduced the limit at which the right was for sale to $105,000.00.

*Exhibit 7 of Return*

4. On March 12, 1929, I was informed by the Secretary of the New York Stock Exchange that he had contracted to sell the right attaching to the seat standing in my name for $108,000.00.

5. On March 9, 1929, I received a power of attorney from the Secretary of the New York Stock Exchange which I executed and by which I appointed our New York correspondents at that time Messrs. F. B. Keach & Company to act as my attorney for me in connection with the final disposition of my said right.

6. The sale of my said right was completed through Mr. West of the firm of F. B. Keach & Company and the money therefor was paid to my firm through Messrs. F. B. Keach & Company.

s. C. HANDASYDE WHITNEY.

Commonwealth of Massachusetts,
Suffolk, ss:

Personally appeared before me C. Handasyde Whitney and made oath that the foregoing affidavit my him described was true.

s. MARCIEN JENCKES,
Notary Public.

226 **Exhibit 8 of Return.**

*Determination of State Tax Commission, Dated December 10, 1934.*

STATE OF NEW YORK

THE STATE TAX COMMISSION

IN THE MATTER

of

227 The Application for Revision of Income Taxes Assessed against C. HANDASYDE WHITNEY for the Year 1929.

No return of personal income having been filed by the taxpayer for the taxable year 1929, on March 8th, 1933, assessment of tax in the amount of $2,115.00, our No. 562190, was duly stated and notice thereof mailed to the taxpayer; and thereafter on March 22nd, 1933, a return having been filed by the taxpayer under protest upon which the tax was computed by the taxpayer at $283.00 only; and said return having been duly audited and the amount of tax due under assessment No. 562190 having been adjusted at $181.82 and the balance thereof cancelled; and on May 5th, 1933, an additional tax having been found due of $98.18 upon the audit of said return and due notice thereof having been given to the taxpayer under additional assessment No. 567511 on said date, a total of additional taxes for the year of $280.00; and the taxpayer having duly made application under Section 374 of the Tax Law for a recomputation and revision of

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such assessments; and the taxpayer having waived the formal hearing provided under Section 374 of the New York State Tax Law and the matter having come on for hearing by stipulation before Roy H. Palmer, Esq., First Assistant Director of the State Income Tax Bureau, on June 13th, 1934, the taxpayer having been represented by Marcien Jenckes, Attorney, 30 State Street, Boston, Massachusetts; and testimony having been taken and it having been stipulated that the record thereof should be of the same force and effect as though taken in a formal hearing before the State Tax Commission; and such record having come before the Commission for review, and it appearing that no questions of fact are involved but only questions of law, and such questions of law having been duly considered by the Commission, it is

DETERMINED: That the computation of the additional taxes against the said taxpayer for the year 1929 in accordance with the audit of said return was correct, and that the additional taxes so stated were properly assessed and due, and do not include any taxes or other charges which should not have been lawfully demanded, and that no payment has been illegally made or exacted thereupon; and that the taxpayer is not entitled to any further resettlement of the taxes so assessed.

Dated, Albany, N. Y., December 10, 1934.

THE STATE TAX COMMISSION

(Signed) MARK GRAVES
Commissioner.

(Signed) JOHN P. HENNESSEY,
Commissioner.

232 **Stipulation Waiving Certification in Appellate Division.**

Pursuant to the Civil Practice Act it is hereby stipulated and agreed that the foregoing printed papers are true copies of the original notice of application for writ of certiorari, petition, undertaking, order for writ, writ of certiorari, admissions of service, return to the writ by the State Tax Commission and its determination and of all the papers upon which the New York State Tax Commission acted in
233 making the determination herein sought to be reviewed, the whole constituting the complete record now on file with the Clerk of Albany County.

Certification of the foregoing papers is hereby waived.

Dated, New York, 1935.

CLARK, CARR & ELLIS,
Attorneys for Relator.

JOHN J. BENNETT, Jr.,
Attorney-General,
Attorney for Defendants.

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**Order of Appellate Division Confirming Determination.** 235

At a Term of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, held at the County Court House in the City of Albany, New York, commencing on the 17th day of September, 1935.

Present: Hon. James P. Hill,
Presiding Justice. 236
Hon. Leon C. Rhodes,
Hon. Daniel V. McNamee,
Hon. John C. Crapser,
Hon. F. Walter Bliss,
Associate Justices.

PEOPLE OF THE STATE OF NEW YORK, *ex rel.* C. Handasyde Whitney,
Relator,
against
MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York, 237
Defendants.

The relator, C. Handasyde Whitney, in the above entitled proceeding having heretofore and on the 8th day of March, 1935, obtained an order and writ of certiorari to review a final determination of the State Tax Commission, made on or about the 10th day of December, 1934, as-

238 *Order of Appellate Division Confirming Determination*

sessing an additional income tax against the relator for the calendar year 1929; and a return to said order and writ of certiorari having been duly made, and the issues raised having come on for hearing before this Court, at the above named term thereof; and the cause having been argued and the relator having appeared by Clark, Carr & Ellis, Esquires, and Marcien Jenckes, Esq., his attorneys, and the defendants
239 having appeared by Hon. John J. Bennett, Jr., Attorney-General of the State of New York, Joseph M. Mesnig, Assistant Attorney-General, of Counsel, their attorneys; and due deliberation having been had thereon,

Now, on motion of John J. Bennett, Jr., Attorney-General of the State of New York, attorney for the defendants, it is

Ordered, That the said determination of the State Tax Commission, made on or about the 10th day of December, 1934, be, and the same hereby is, unanimously confirmed, with fifty dollars costs.

240 JOHN S. HERRICK,
Clerk.

**Decision of Appellate Division Confirming Determination.**

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

Nov. 13, 1935.

PEOPLE OF THE STATE OF NEW YORK, *ex rel.* C. HANDASYDE WHITNEY,
Relator,
v.
MARK GRAVES and Others, as Tax Commissioners of the State of New York,
Defendants.

Certiorari to review a final determination of the State Tax Commission assessing additional income tax against relator for the calendar year 1929.

The question presented is whether the State of New York has jurisdiction to tax as income profits derived by a non-resident from the sale of an interest in a membership on the New York Stock Exchange.

Relator, a resident of Massachusetts, acquired an undivided share or interest in a New York State Stock Exchange membership, which interest he sold at a profit, and the State Tax Commission has imposed a tax upon such profit, as income upon property within the State of

244 *Decision of Appellate Division Confirming Determination*

New York, pursuant to the provisions of Section 351 of the Tax Law.

Relator and his firm were the owners of a membership on the Stock Exchange in addition to their interest or share in the membership here involved. He and his said firm did not use their membership rights for the purpose of trading upon the floor of the Exchange. Orders of the firm were placed and executed through an-
245 other New York brokerage firm, in the same way as any customer would have placed such an order with the New York firm, the only advantage accruing to the relator and his firm being that by virtue of their being members of the New York Stock Exchange, their orders placed with other brokers for execution, were carried out for a smaller commission charge than the charge to customers not members of the Exchange.

Determination unanimously confirmed with fifty dollars costs and disbursements.

Present—Hill, P. J., Rhodes, McNamee, Crap-
246 ser and Bliss, JJ.

**Order of Court of Appeals Granting Permission to Appeal.**

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the tenth day of March, A. D. 1936.

Present: Hon. Frederick E. Crane,
Chief Judge, presiding.

THE PEOPLE, &c., on relation of C. HANDASYDE WHITNEY,
Relator,

vs.

MARK GRAVES, JOHN P. HENNESSEY and JOHN J. MERRILL, as Tax Commissioners of the State of New York,
Defendants.

A Motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the relator herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted.

A copy.

JOHN LUDDEN,
Deputy Clerk.

(Seal of the Court of Appeals)

250 **Notice of Appeal to Court of Appeals.**

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

PEOPLE OF THE STATE OF NEW YORK, *ex rel.* C. HANDASYDE WHITNEY,

Relator,

against

251 MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York,

Defendants.

Sir:

Please Take Notice that pursuant to permission granted by the Court of Appeals, the above named Relator hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Judicial De-
252 partment, entered herein in the Office of the Clerk of the County of Albany, on or about the 19th day of November, 1935, confirming on certiorari a determination of the State Tax Commission assessing a tax under Section 375 of Article 16 of the Tax Law, and denying application of the Relator, pursuant to Section 374 of the Tax Law, for revision and refund of the tax assessed against him for the tax year 1929,

and Relator appeals from each and every part of said order and the whole thereof.

Dated, March 11, 1936.

CLARK, CARR & ELLIS,
Attys. for Relator-Appellant,
120 Broadway,
New York City.

To:

John J. Bennett, Jr., Esq.,
Attorney-General,
Attorney for Defendants-Respondent,
John A. Knox,
Clerk of Albany County.

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**Stipulation Waiving Certification.**

[Same Title.]

It Is Stipulated that the foregoing are true and correct copies of the decision and order of the Appellate Division of the Supreme Court, Third Judicial Department confirming the determination of the defendants, the order of the Court of Appeals granting permission to relator to appeal to the Court of Appeals herein, and the notice of appeal by the relator-appellant to the Court of Appeals, now on file in the Office of the Clerk of Albany County. Certification thereof is hereby waived, and it is stipulated that the within case is hereby adopted as the case on appeal to the Court of Appeals.

Dated, March , 1936.

CLARK, CARR & ELLIS,
Attorneys for Relator-Appellant.
JOHN J. BENNETT, Jr.,
Attorney for Defendants-Respondents.

Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 86] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, SS:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of May in the year of our Lord one thousand nine hundred and thirty-six, before the Judges of said Court.

Witness the Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—May 20, 1936

[fol. 87] THE PEOPLE, ETC., ex Rel. C. HANDASYDE WHITNEY, Appellant,

ag'st

MARK GRAVES & ors., as Tax Commissioners of the State of New York, Respondents

Be it Remembered, That on the 24th day of March, in the year of our Lord one thousand nine hundred and thirty-six, C. Handasyde Whitney, the appellant in this cause, came here into the Court of Appeals, by Clark, Carr & Ellis, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Mark Graves and others, as tax commissioners, etc., the respondents in said cause, afterwards appeared in said Court of Appeals by John J. Bennett, Jr., Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Paul A. Crouch, of counsel for the appellant; and by Mr. Joseph M. Mesnig, of counsel for the respondents; and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed with costs.

[fol. 88] And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

And afterwards, to wit, on the 26th day of May, 1936, an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, It is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS

Clerk's Office

Albany, May 20, 1936.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 89] IN COURT OF APPEALS OF NEW YORK

Present: Hon. Frederick E. Crane, Chief Judge, Presiding.

THE PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY, Appellant,

vs.

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York, Respondents

ORDER AMENDING REMITTITUR—May 26, 1936

A motion to amend the remittitur in the above cause having been heretofore made herein upon the part of the appellant, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and remittitur amended by adding thereto the following:

"Upon the appeal herein the relator contended that the assessment of a tax against relator under Sections 351 and 351-a of the Tax Law of the State of New York contravenes the Fourteenth Amendment of the Federal Constitution as an extraterritorial tax, and such question was presented and necessarily passed upon but not sustained by the court."

A Copy.

Rufus Kimball, Deputy Clerk. (Seal.)

[fol. 89½] Clerk's certificate to foregoing papers, omitted in printing.

SIR:

Take notice that the within is a copy of Remittitur and Order amending Remittitur, duly filed and entered in the office of the Clerk of Albany County, on the 1st day of June, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office and Post Office Address: Capitol, Albany, N. Y.

To Clark, Carr & Ellis, Esqs., Attorney for Appellant, 120 Broadway, New York, N. Y.

[fol. 90] In Supreme Court of New York, Albany County

The People of the State of New York on Relation of C. Handasyde Whitney, Relator,

against

Mark Graves, John J. Merrill and John P. Hennessey, as Tax Commissioners of the State of New York, Respondents

Order on Remittitur—June 1, 1936

The relator above named having appealed to the Court of Appeals from a final order of the Appellate Division of the Supreme Court, Third Judicial Department, in the above entitled proceeding, and which order unanimously confirmed a final determination of the respondents as Commissioners constituting the State Tax Commission of the State of New York, made on or about the tenth day of December, 1934, affirming an assessment of additional income taxes against the relator for the calendar year 1929, and which said final order was duly entered in the office of the Clerk of the Appellate Division, Third Department; and the appeal having been duly argued at the Court of Appeals, and after due deliberation had thereon, the Court of [fol. 91] Appeals having made its decision and having ordered and adjudged that the order of the Appellate Division of the Supreme Court so appealed from be affirmed, with costs, and having further ordered that the proceedings and record herein be remitted to the Supreme Court, there to be proceeded upon according to law.

Now, on reading the remittitur from the Court of Appeals herein, and the order of the Court of Appeals made on the 26th day of May, 1936, granting relator-appellant's motion to amend said remittitur, and upon motion of John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for the above named respondents, it is

Ordered, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and it is further

Ordered, that the respondents have judgment against C. Handasyde Whitney, the relator herein, for their costs and disbursements in the Court of Appeals, to be taxed.

Gilbert Schenck, Justice of the Supreme Court.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 91½] SIR:

Take notice that the within is a copy of Order, duly filed and entered in the office of the Clerk of Albany County, on the 1st day of June, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office and Post Office Address: Capitol, Albany, N. Y.

To Clark, Carr & Ellis, Esqs., Attorney for Relator, 120 Broadway, New York, N. Y.

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[fols. 92 & 93] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

**Petition of the Relator for Appeal, Assignment of Errors and Prayer for Reversal**

[fol. 94] ASSIGNMENT OF ERRORS

8. The appellant, C. Handasyde Whitney assigns the following errors in the record and proceedings had in this case:

The Court of Appeals erred:

1. In holding that the Petitioner, a resident of Massachusetts who never had an office or place of business in New York was subject to income taxation under sections 351 and 351A of the New York Tax Law on profit resulting from the sale of a fraction of a New York Stock Exchange membership.

2. In holding that the Petitioner's fractional Exchange membership which he sold in 1929 was "property owned" in New York.

3. In holding that the Petitioner's Exchange membership had acquired a "business sifus" in New York sufficient to permit profit from the sale of a fraction thereof to be taxable as income from "property owned in New York."

4. In failing to reverse the order of the Supreme Court Appellate Division Third Judicial Department and the determination of the Appellees on the ground that the tax levied against the appellant was unconstitutional and void as beyond the jurisdiction of New York.

PRAYER FOR REVERSAL

Wherefore, on account of the foregoing errors, the appellant prays that the said order and judgment of the Supreme Court of the State of New York and that the said decision of the Court of Appeals of the State of New York, upon which said order and judgment were entered, in the above entitled cause, be reviewed by the Supreme Court of the United States and reversed and judgment rendered in favor of the appellant with costs in all courts; that a [fol. 95] transcript of the records duly authenticated be sent to Washington as provided by law and that an order be made fixing the security to be provided by the appellant, and that the bond tendered by him be approved.

C. Handasyde Whitney, by Clark, Carr, & Ellis, Attorneys.

Clerk's certificate to foregoing paper omitted in printing.

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[fol. 96] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above entitled case, having prayed for the allowance of an appeal in this case to the Supreme Court of the United States from the order and judgment of the Supreme Court of the State of New York entered in the office of the Clerk of Albany County on June 1, 1936, upon the remittitur handed down by the Court of Appeals on May 20, 1936, as amended by order of said Court of Appeals on May 26, 1936, and having presented and filed its petition for appeal, assignments of error, prayer for reversal and statement as to jurisdiction on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It Is Now Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States as provided by law, and

It Is Further Ordered that the Clerk of the Supreme Court of the State of New York for Albany County, to which court the record herein has been remitted, shall pre-
[fols. 97-102] pare and certify a transcript of the record, proceedings, order and judgment in this cause and transmit the same to the Supreme Court of the United States so that the transcript shall reach said court within forty days of this date.

And it is Further Ordered that the security for costs on appeal be fixed in the sum of Five Hundred Dollars ($500).

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

Dated June 16th, 1936.

Clerk's certificate to foregoing paper omitted in printing.

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[fol. 103] In Supreme Court of the United States

Statement of the Appellant Under Rule 13 Paragraph 9—Filed August 3, 1936

Now comes the appellant in the above entitled case and in compliance with Rule 13 Paragraph 9 of the Rules of the Supreme Court of the United States makes this statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof.

Points on Which the Appellant Intends to Rely

1. The appellant is a resident of Massachusetts and neither he nor any of his partners ever had a domicile in or carried on business in New York.

2. The situs of the appellant's membership in the New York Stock Exchange, an unincorporated association organized in 1799 holding the beneficial ownership of the stock of the corporation owning the land and building in New York City where the exchange is located, is, for the purposes of the income taxation of profit resulting from a

sale of a fraction of that membership, at the appellant's domicile in Massachusetts unless the membership has acquired a "business situs" in New York.

[fol. 104] 3. The appellant's membership in the New York Stock Exchange had not acquired a "business situs" in New York sufficient to permit the State of New York to tax as income from "property owned in New York" the profit resulting to the petitioner from the sale of a fraction of that membership.

4. Profit resulting to the appellant from the sale of a fraction of a membership in the New York Stock Exchange is not subject to income taxation by the State of New York under Sections 351 and 351A of the New York Tax Law.

Parts of the Record Necessary for the Consideration of the Appellant's Points

1. The following portions of the printed record on appeal in the Court of Appeals for the State of New York constituting parts of the papers in the case noted hereunder at the following pages and folios:

| Caption of paper | Pages | Folios |
|---|---|---|
| Petition for Order and Writ of Certiorari served Feb. 27, 1935, filed March 8, 1935 | 4–12 | 12–35 |
| Return to writ of certiorari and exhibits as follows: | 30–31 | 88–93 |
| Exh. 1 | 32–35 | |
| Exh. 3 | 37–38 | 109–114 |
| Exh. 5 | 41–43 | 121–128 |
| Exh. 6 | 44–73 | 130–216 and exhibits B & C attached between pages 72 & 73 |
| Exh. 7 | 74, 75 | 220–224 |
| Exh. 8 | 76, 77 | 226–231 |
| Order of Appellate Division confirming determination | 79, 80 | 235–240 |
| Decision of Appellate Division confirming determination | 81–82 | 241–246 |

2. The following papers certified in typewritten form to the United States Supreme Court by the clerk for Albany County:

Remittitur of the Court of Appeals dated May 20, 1936 and order amending remittitur dated May 26, 1936.

[fol. 105] Final order and judgment on Remittitur entered in the Supreme Court of New York for Albany County June 1, 1936.

Assignment of Errors.

Prayer for Reversal.

Order allowing appeal.

John L. Hall, Marcien Jenckes, Counsel for Appellant.

Service acknowledged this 31st day of July, 1936.

John J. Bennett, Jr., Counsel for Appellee, Address: Attorney General's Dept., Albany, N. Y.

[fol. 106] [File endorsement omitted.]

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Endorsed on cover: Enter Claude R. Branch. File No. 40,758. New York Supreme Court. Term No. 218. The People of the State of New York, ex rel. C. Handasyde Whitney, Appellant, vs. Mark Graves, John P. Hennessey and John J. Merrill, Tax Commissioners of the State of New York. Filed July 22, 1936. Term No. 218, O. T., 1936.

FILE COPY

FILED
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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# No. 218

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THE PEOPLE OF THE STATE OF NEW YORK EX REL. C. HANDASYDE WHITNEY,

*Appellant,*

*vs.*

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, AS TAX COMMISSIONERS OF THE STATE OF NEW YORK.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

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## STATEMENT AS TO JURISDICTION.

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JOHN L. HALL,
MARSHALL JOHNSON,
CHARLES R. BRAINCH,
*Counsel for Appellant.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

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# No. 218

---

THE PEOPLE OF THE STATE OF NEW YORK EX REL. C. HANDASYDE WHITNEY,

*Relator,*

*vs.*

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, AS TAX COMMISSIONERS OF THE STATE OF NEW YORK,

*Defendants.*

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## STATEMENT AS TO JURISDICTION ON APPEAL.

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Pursuant to Rule 12 this statement disclosing the basis on which it is contended that the Supreme Court of the United States has jurisdiction to review on appeal the orders and decisions of the New York courts is filed.

### I.

### Statutory Provision Sustaining Jurisdiction.

Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 299, 43 Stat. 936, 937 (U. S. C. A., Tit. 28, § 344 (a)), provides as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could

be had, where * * *; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error * * *."

Pursuant to the Act of January 31, 1928 (45 Stat. 54; U. S. C. A., Tit. 28, § 861 (a)), as amended by Act of April 26, 1928 (45 Stat. 466; U. S. C. A., Tit. 28, § 861 (b)), the present appeal is brought in lieu of a writ of error.

## II.

### New York Statute of Which the Validity is Involved.

Under Sections 351 and 351-a of the Tax Law of New York an income tax was levied against the appellant, who never lived or carried on business in New York, upon profit derived by him in 1929 from the sale of a fractional membership in the New York Stock Exchange.

The Sections 351 and 351-a, material provisions of which are quoted below are part of Article 16 of the New York Tax Law, Chapter 60 of the Consolidated Laws of New York, and may be found in Book 59 of McKinney's Consol. Laws of New York Annotated, at pages 643 and 644 or in Cahill's Consol. Laws of New York, 2d Edition (1930), Chapter 61, pages 2388 and 9.

SECTION 351: "A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: * * * A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried

on in this state by natural persons not residents of the state * * *"

SECTION 351-a. "The tax provided for in section three hundred and fifty-one of this chapter, upon and with respect to income derived from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state, is hereby reimposed with respect to the taxable income for the calendar year nineteen hundred and nineteen and for any taxable year ending during the year nineteen hundred and nineteen, and for each year thereafter * * *"

## III.

## Dates of Judgment and of Presentation of Application for Appeal.

The order and judgment sought to be reviewed was entered June 1, 1936 (R. 90), in the Supreme Court of the State of New York for Albany County upon a remittitur from the Court of Appeals of said state handed down May 20, 1936 as amended by order of May 26, 1936 (R. 86).

The petition for appeal is to be presented this 16th day of June 1936.

## IV.

## Opinions Below.

No opinion was filed either by the Supreme Court, Appellate Division or by the Court of Appeals, but a short decision by the Appellate Division appears at folios 242 to 246 of the record, pages 81 and 82, and the remittitur of the Court of Appeals with amendment appears at pages 86 to 89 of the record.

## V.

### Nature of the Case and Jurisdiction Upon Appeal.

The tax levied against the Appellant, a resident of Massachusetts who never had a domicile in or carried on business in New York, was assessed against him on the ground that in 1929 he had income "from property owned" in New York.* The Respondent Tax Commissioners have never before or since the tax here involved endeavored to impose an income tax on the business of the petitioner or his firm. They do not attempt to sustain the instant tax under the second clause of the taxing language as a tax upon the appellant's income from a business "carried on in this state." Obviously the appellant's firm, Whitney & Elwell, were not carrying on a business in New York by any definition.

*Bank of America* v. *Whitney Bank*, 261 U. S. 271;
*Hovey* v. *DeLong Hook & Eye Co.*, 211 N. Y. 420;
Art. 415 of the Regulations of the New York State Tax Commission contained in Manual 32 issued by said Commission.

### Statement of Facts.

The New York Stock Exchange is an unincorporated association organized in 1799 holding the beneficial ownership of the stock of the corporation owning the land and building in New York City where business on the Exchange is transacted. It is supported by dues and charges made against and paid by its members. Membership is evidenced by a certificate in the form of a letter signed by the secretary of the Exchange. It can be transferred only with approval of the Exchange (fols. 134-5, 157-8, 161).

In 1929 the Exchange increased its membership 25% by issuing in the nature of a stock dividend to each of its then members a so-called "right" representing one-quarter

interest in a new membership. The appellant, a member of the Exchange and of the Boston firm of Whitney & Elwell since 1909, sold such right for $108,000. The tax is question was upon the difference between this and one-fifth of the price originally paid for the membership plus capital additions (fols. 133, 139, 144, 160).

The appellant has always been domiciled in Massachusetts. He and his firm have been in the securities business in Boston since the date of acquisition of his membership, with their only office there. Neither the firm nor any of its members has ever had an office, domicile, or abode in New York nor did they ever carry on business there. They did not buy and sell securities on the Exchange for their firm account (fols. 137 to 142, 175).

The firm's business consisted almost entirely of commission orders from customers received at its Boston office for the purchase and sale of securities listed on the New York Stock Exchange. None of this was conducted by the appellant or members of his firm on the floor of the exchange or in New York State; orders requiring execution on the Exchange were all given to independent firms, members of the Exchange who had business offices in New York and who executed and completed the orders on the Exchange in their own names as principals (fols. 145-7, 177). These independent New York firms acted as correspondents for the appellant's firm lending money on the security of the stocks purchased and other collateral delivered to them.

The Exchange rules prescribe a minimum commission which must be charged by all members for the execution of orders for non-members. By reason of the appellant's membership in the Exchange his firm is able to have their New York correspondents execute orders at forty per cent of the commission fixed for non-members. Whitney & Elwell charges its customers the fixed minimum commission

which the customer would have to pay any Stock Exchange house through whom he did business and pays forty per cent of that commission to the New York correspondent who actually executed the order in New York, retaining the other sixty per cent as its compensation. This division of the commission was fixed by mutual agreement between Whitney & Elwell and the New York firms which actually did the business (fols. 152-156, 182, 183, 187, 189, 201, 202).

The appellant's profit on the sale of his "right" was required to be reported as taxable income at his domicile in Massachusetts, although deductions for other losses resulted in no Massachusetts tax being actually paid (fols. 90, 91).

**How the Federal Question was Raised and Decided.**

By claims for refund filed when he paid the taxes under protest the appellant raised the question as to the validity of the tax under the Federal Constitution (fols. 113, 114, 125, 126).

By his petition under Sec. 375 of the New York State Tax Law, for writ of certiorari to review the determination of the respondents affirming the tax the question of New York's jurisdiction under the Federal Constitution to levy this tax was raised before the court (fol. 33).

The decision of the Appellate Division of the Supreme Court of New York affirming the determination of the respondents stated the question as "whether the State of New York has jurisdiction to tax as income profits derived by a non-resident from the sale of an interest in a membership on the New York Stock Exchange," and that the tax was imposed as a tax upon "income upon property within the State of New York" (fol. 243).

The Court of Appeals affirmed the tax against the appellant's contention "that the assessment * * * contravenes the Fourteenth amendment of the Federal Constitu-

tion as an extraterritorial tax, and such question was presented and necessarily passed upon but not sustained by the court'' (Amended Remittitur of the Court of Appeals at R. 89).

The Supreme Court of New York for Albany County in pursuance of this remittitur entered final judgment against the appellant (R. 90). This constitutes the final decision of the highest court of the State in which a decision could be had so that the appeal is taken directly from that order and judgment. The amendment to the remittitur showing the Federal question necessarily passed upon is in accordance with the suggestion made in this Court's opinion in *Lynch* v. *New York*, 293 U. S. 52, 55.

Therefore, in this case the validity of a state statute (Secs. 351 and 351 A of the New York Tax Law) was clearly and seasonably drawn in question on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity, the highest court of the state in which a decision could be had having passed upon the question and decided it against the Appellant.

*First National Bank* v. *Maine*, 284 U. S. 312;
*Hoeper* v. *Tax Comm. of Wisconsin*, 284 U. S. 206;
*Mayflower Farms, Inc.*, v. *Ten Eyck*, 297 U. S. 266;
*Atlantic Lumber Co.* v. *Comm. of Corporations and Taxation*, 297 U. S. —, 80 L. Ed. 908,

are all cases where similar if not identical procedure has been followed. All of them support the assumption of appellate jurisdiction by this Court in cases where was raised the same type of question as is presented on this appeal.

The dismissal of appeals in *People ex rel. Blagden* v. *Lynch* and *People ex rel. Sackett* v. *Lynch*, 291 U. S. 652, 292 U. S. 602, 608, are not authority in the case at bar because the pleadings, particularly the remittitur of the Court

of Appeals, did not show that a Federal question had necessarily been decided by the New York courts, and for the further reason, set forth more fully below, that the appellants in those cases carried on business in New York.

**The Substantial Nature of the Federal Question.**

(a) *Unless a "Business Situs" Existed in New York the Tax Against the Appellant was Invalid.*

A New York Stock Exchange membership has been determined by this Court to be intangible personalty, subject to local property taxation at the Ohio domicile of the owner and not so bound up with the physical location of the Exchange as to be like real property, subject to personal property tax only in New York. Thus, it has been authoritatively decided by this Court that a New York Stock Exchange membership is property owned at the owner's domicile in Ohio, not in New York.

*Citizens National Bank* v. *Durr*, 257 U. S. 99*.

Recent decisions of this Court have prevented taxation of intangibles owned by non-resident decedents even though the intangibles were creatures of or located in the state seeking to tax.

*Farmers Loan & Trust Co.* v. *Minn.*, 280 U. S. 204, involving registered obligations of the state or its municipalities physically located there.

*Baldwin* v. *Missouri*, 281 U. S. 586, involving cash in banks, bonds and notes secured by local mortgages all kept in the state attempting to tax but owned by a non-resident decedent.

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* Note that if the membership had been held to be an incorporeal hereditament it would have had a taxable situs and been owned *only* in New York. 257 U. S. 109; *Louisville & Jeffersonville Ferry Company* v. *Kentucky*, 188 U. S. 385.

*First National Bank* v. *Maine*, 284 U. S. 312, *supra*, involving shares in a Maine corporation owned by a Massachusetts decedent.

These decisions which specifically overrule at least one earlier case * rest upon the theory that two states cannot tax the same thing on "different or inconsistent principles" and that the only state in which intangibles are for purposes of taxation is the state of the owner's domicile, where by force of the maxim *mobilia sequuntur personam* the intangible property has its situs.

*First National Bank* v. *Maine*, 284 U. S. 312, *supra*, at 326, 329.

If these decisions mean what they say the situs of the appellant's Exchange membership was in Massachusetts. Being an intangible it was property owned at its situs at its owner's domicile and taxable there. It was not "property owned" in New York, particularly in a case such as the one at bar where the taxpayer was a complete non-resident without home or business in New York.

Barring the acquisition by the appellant's membership or "right" of a "business situs" it results from the above cases that it is beyond New York's jurisdiction under the Federal Constitution to tax profit resulting from the sale of those intangibles owned by non-residents as income from "property owned in" that state.

*Shaffer* v. *Carter* and *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U. S. 37 and 60, sustaining income taxes on non-residents concerned only business carried on and real or tangible property owned by non-residents in the taxing state. In *Shaffer* v. *Carter*, *supra*, at p. 57 it was stated that the jurisdiction of a state to tax non-residents "extends only to their property owned within the state and

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* *Blackstone* v. *Miller*, 188 U. S. 189.

their business, trade, or profession carried on therein." There is no decision of this Court holding valid in the absence of a "business situs" an income tax on profit resulting to non-residents from the sale of intangibles. On the contrary the recent cases relied on herein hold that intangibles can be "property owned" only at the owner's domicile. To tax intangibles or profit resulting from their sale, elsewhere than at the owner's domicile is to disregard the above discussed cases which hold, as stated in *Baldwin* v. *Missouri*, 281 U. S. 586 at 593, *supra*, that intangibles owned by a non-resident with no "business situs" in the state are not within the state for taxation purposes.

The question in the case at bar is not one of double or multiple taxation. It is a question of New York's jurisdiction to tax and its inability to tax this particular intangible property which is owned elsewhere. This inability is not cured by the provisions of the New York Tax Law allowing credit to non-residents for taxes paid to their home state.

*First National Bank* v. *Maine*, *supra*, where identical provisions for credit were not permitted to validate the tax.

(b) *There Was No "Business Situs" in New York.*

Profit from the sale of an exchange membership owned by a non-resident is income taxable by New York if the owner, having a business office in New York, used his membership by personally executing orders on the floor of the Exchange. *People ex rel. Blagden* v. *Lynch*, and *People ex rel. Sackett* v. *Lynch*,* 238 App. Div. 881; 263 N. Y.

* That the tax in those cases was explicitly rested on the acquisition of a "business situs" appears from the notice of assessment in the *Blagden* case (Blagden record, fol. 113) and from the hearing in the *Sackett* case (Sackett record, fol. 136).

568; appeal dismissed for want of jurisdiction and certiorari denied—291 U. S. 652; 292 U. S. 602, 608.

The memberships in those cases had acquired a "business situs" in New York because the owners personally used the memberships in their New York business on which they paid uncontested income tax to New York, in addition to the contested assessment on the membership sale profit.

"Business situs" permitting a state other than that of the domicile of the owner of an intangible to tax intangibles which have acquired such a situs is a recognized exception to the cases cited in the previous section of this statement. *First National Bank* v. *Maine, supra,* at p. 331; *Farmers Loan Co.* v. *Minn., supra,* at p. 213.

It seems a manifest contradiction to support the result in the case at bar upon a theory of "business situs" in New York when it is clear and admitted that neither the appellant nor his firm were doing a taxable business there on any conceivable theory. *Bank of America* v. *Whitney Bank,* 261 U. S. 171, *supra.*

"Business" carried on elsewhere certainly cannot give a "business situs" in New York. When used by itself and when used with "situs," the word "business" must have approximately the same meaning. None of the decided cases in this Court indicate "business situs" is established by facts such as those existing in the case at bar.

The only authoritative cases in this Court which sustain taxation of intangibles elsewhere than at the owner's domicile on the ground of a "business situs" acquired there are based on their personal use or employment in a business carried on in the second state.

*New Orleans* v. *Stempel,* 175 U. S. 309, where a non-resident conducted a business of loaning money on Louisiana real estate, through an agent there;

*Bristol* v. *Washington County,* 177 U. S. 133, an identical case except that the evidences of the credits were payable

to the non-resident owner and custody of them was not continuously kept by the local agent;

*Board of Assessors* v. *Comptoir National,* 191 U. S. 388, where a non-resident company carried on a local loan business through an agent who had custody of the evidences of the credits;

*Scottish Union & National Insurance Company* v. *Bowland,* 196 U. S. 611, where bonds deposited with the state of Ohio under its laws regulating the doing of insurance business there were held subject to property tax there.

*Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395, a similar case except that the notes were not continuously in the local agent's custody although they were whenever needed for the purposes of the business;

*Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346, where extensions of premium credits were granted to local policyholders as a part of the business of a company qualified to do business there;

*Rogers* v. *Hennepin County,* 240 U. S. 184, which sustained a property tax on memberships in a Minneapolis Exchange, in a case where the pleadings admitted personal use of the Exchange membership in business there, and where this Court stated (240 U. S. 191): "it sufficiently appears from the allegations that the memberships represented rights and privileges *which were exercised in transactions at the Exchange in the City of Minneapolis;* and, we are of the opinion, applying a principle which has had recognition with respect to credits in favor of non-residents arising from business within the State, and in the case of shares of stock of domestic corporations, that it was competent for the State to fix the *situs* of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the State where the exchange was located," citing *Tappan* v. *Merchants*

*National Bank*, 19 Wall. 490; *Corry* v. *Baltimore*, 196 U. S. 466, and some of the cases listed on the preceding page hereof.

In all of these cases the owner of the intangible either personally used the intangible in the State where "business situs" was established, or the evidences of the intangibles were physically present there or managed by a general agent who had general authority to deal with them. In the appellant's case there was no personal use in New York. The only representation the appellant had in New York was that of independent contractors doing business there who took and executed in their own names orders received from the appellant's firm, were paid for each item of service rendered in New York and who had no general authority to deal with the appellant's property.

In such circumstances there is no "business situs" in New York. *Newport Company* v. *Wisconsin State Tax Commission* (Wisconsin 1935), 261 N. W. 884, 297 U. S. —, 80 L. Ed. 651, in which, applying the principles of the above cases and on the ground that there was no "business situs", a state income tax assessment was held invalid against a Delaware Corporation doing business in Wisconsin for profit resulting from (1) the sale of securities and (2) the sale of patent rights developed as a by-product of research work in the company's laboratories in Wisconsin.

With particular reference to the decision of *Rogers* v. *Hennepin County*, 240 U. S. 184, *supra*, and the principle applied in accordance with the above quotation, it is important to note the following three facts which show clearly that the decision is not controlling authority in the case at bar.

1. New York has definitely not fixed the situs of memberships for the purpose of taxation at the place where the

Exchange was located. In fact New York Stock Exchange memberships are not subject to a personal property tax even to resident owners because the personal property tax law does not attempt to reach them. (*Slade* v. *Comm. of Taxes*, 53 Misc. 336, 104 N. Y. S. 756; *Lemmon* v. *Feitner*, 167 N. Y. 1, 60 N. E. 265; *Matter of Hellman*, 174 N. Y. 254, 66 N. E. 809.)

The appellant's case and the *Rogers* case therefore stand on very different bases because in the latter a local statute has determined a situs for property taxation to both residents and non-resident owners while in the former the local statute has not determined a personal property tax situs even for resident owners.

2. The appellant never used his membership personally to execute any orders, whereas Paragraph eleven of the amended bill in the Rogers case admitted such a personal use by the taxpayers there and raised no question of orders for customers such as exists in the case at bar.

3. Since the decision in the *Rogers* case this Court has ruled that two States cannot tax the same thing at the same time on inconsistent legal theories. It follows that so far as the *Rogers* case stands for the general proposition that, irrespective of statute determining situs for all concerned (like the National Banking Act provisions sustained in *Tappan* v. *Merchants Bank*, 19 Wall. 490, or the Maryland statute upheld in *Corry* v. *Baltimore*, 196 U. S. 466,) Minnesota can tax as property owned there an exchange membership owned elsewhere, it like *Blackstone* v. *Miller*, 188 U. S. 189, is limited by the decision and theories of *First National Bank* v. *Maine, supra, Farmers Loan & Trust Co.* v. *Minnesota, supra, Baldwin* v. *Missouri, supra.*

In the situation at bar the real estate and business of the Exchange are taxed in New York to the New York corporation. (Articles 1, 2, 9a and 9b of the New York State Tax Law (Chapter 60 of the Consolidated Laws of New York)). As one of the persons for whose benefit are held the shares of this corporation the appellant participates in taxation by New York. The actual business of executing orders and carrying securities on margin there is taxed to the New York correspondents of the appellant's firm who have the offices and do the business there (Art. 16, Sec. 351 of the New York Tax Law). The petitioner owned no property in New York and carried on no business there.

Unless the standards of facts which can create a "business situs" are to be tremendously relaxed from those of the decided cases, neither the appellant's membership nor his "right" had any "business situs" in New York. There is no authority for such relaxation. Nor is there any occasion so to relax them because the whole theory of taxation based upon the acquisition of a "business situs" is to see that business or property used or in a State does not escape contribution to the cost of government because of its ownership elsewhere.

*Newport Company* v. *Wisconsin Tax Commission* (Wisconsin 1935), 261 N. W. 884, 297 U. S. —, 80 L. ed. 651.

(c) *The Importance and Scope of the Question*

Although the amount involved in this one case is small, over $30,000 in tax is dependent upon the result here and there is no decision of this Court subsequent to the decisions of *Farmers Loan & Trust Company* v. *Minn.*, 280 U. S. 204, *supra*, and *First National Bank* v. *Maine*, 284 U. S. 312, *supra*, indicating how far the principles of those recent cases are limited, if at all, in their application to

property, income or inheritance taxation of Exchange memberships, the owners of which do not personally transact business on the Exchange. There are many exchanges or boards of trade in this country whose memberships are owned by non-residents or even aliens so that the property, income and inheritance taxation of them is one of substance and of recurring importance.

See *The Passing of Situs XLV Harv. L. Review,* 777 at 784.

(d) *The unsoundness of the Respondent's Position.*

This Court will itself inquire as to whether the facts presented were sufficient to give the intangible a "business situs."

> *Beidler* v. *So. Carolina Tax Comm.,* 282 U. S. 1, reversing the So. Carolina courts and holding that an Illinois majority stockholders' loan to a So. Carolina corporation did not have a "business situs" in So. Carolina.

The respondents endeavor to meet in three unsound ways the manifest contradiction involved in saying that the appellant' membership had a business situs in New York where tne appellant carried on no business.

First, it is urged that an Exchange membership is property *sui generis* so bound up with the locality of the exchange facilities and building that it has in addition to situs as its owner's domicile an additional or dual situs in New York, regardless of the transaction of business in that State. This is only a resurrection of the minority "doubts" in the *Durr* case and is therefore untenable.

Second, it is urged that the appellant was co-owner with the 1099 other members of the Exchange of the Exchange's

property, and hence a partner in the business of operating a stock exchange in New York. As the property in New York where the Exchange is located is owned by a New York corporation, this is the same argument which was refused by this Court in *Rhode Island Hospital Trust Company* v. *Doughton*, 270 U. S. 69, where, in holding shares of a non-resident shareholder, deceased, not taxable by North Carolina in which state was located the principal business and over sixty-six and two-thirds per cent of the assets of the corporation, this Court repudiated "the theory that the stockholder is the owner of the property of the corporation, and the state which has jurisdiction of any of the corporate property has *pro tanto* jurisdiction of his shares of stock." 270 U. S. at 81. Furthermore, the Exchange is a membership and not a profit association; membership may be an incident of the member's business, but is not a business in itself. "The New York Stock Exchange transacts no business as such in the buying and selling of stocks. * * * The business therein transacted is that of the individual members" (*People, ex rel. Lemmon* v. *Feitner*, 167 N. Y. 1, 5; 60 N. E. 265, *supra.*) Ownership of the Exchange building is certainly not a business of the members, since that is vested in a domestic corporation, taxable and taxed as such.

Thirdly, it is urged that the activities of the appellant's firm in dealing with or having its orders executed by its New York correspondents constituted a business in New York. This cannot be so both because the respondents themselves make no effort to tax the appellant for the profit resulting from those activities and also because of this Court's decision in *Bank of America* v. *Whitney Bank*, 261 U. S. 171, *supra*, where very similar transactions were held not to constitute business for the purposes of service of process. If the activities are not business for service of

process or taxation, clearly they are not business sufficient to make valid an extraterritorial tax on an intangible by giving it a "business situs."

It follows that the question raised on this appeal is a Federal one of substance inaccurately decided by the courts of New York and of which this Court has jurisdiction by virtue of Sec. 237 (a) of the Judicial Code as amended.

CLARK, CARR & ELLIS,
CHOATE, HALL & STEWART,
*Counsel for Appellant.*

June 16th, 1936.

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# Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 218.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. C. HANDASYDE WHITNEY,
*Appellant,*

*v.*

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, AS TAX COMMISSIONERS OF THE STATE OF NEW YORK,
*Respondents.*

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APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

---

## BRIEF FOR THE APPELLANT.

JOHN L. HALL,
MARCIEN JENCKES,
CLAUDE R. BRANCH,
RICHARD WAIT,
*Attorneys for Appellant.*

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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# Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 218.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. C. HANDASYDE WHITNEY,

*Appellant,*

*v.*

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, AS TAX COMMISSIONERS OF THE STATE OF NEW YORK,

*Respondents.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

## BRIEF FOR THE APPELLANT.

### Opinions Below.

No opinion was filed either by the Supreme Court Appellate Division or by the Court of Appeals, but a short decision by the Appellate Division (R. pp. 81, 82) is reported in 246 App. Div. 652; 285 N.Y.S. 1045, and the per curiam affirmance by the Court of Appeals with amendment to remittitur (R. pp. 86 to 88) are reported in 271 N.Y. Mem. 90 and 114; 3 N.E. (2d) 201 and 213.

The decision of the Appellate Division of the Supreme Court of New York affirming the determination of the respondents states the question as "whether the State of

New York has jurisdiction to tax as income profits derived by a non-resident from the sale of an interest in a membership on the New York Stock Exchange," and says that the tax was imposed under section 351 "upon such profit as income upon property within the State of New York" (R. p. 81; fol. 243).

**Jurisdiction.**

Jurisdiction of this Court is supported under section 237 (a) of the Judicial Code as amended, because the validity of a state statute (secs. 351 and 351-a of the New York Tax Law) was clearly and seasonably drawn in question on the ground that the statute as interpreted was repugnant to the Constitution of the United States and the decision was in favor of its validity, the highest court of the state in which a decision could be had having passed upon the question and decided it against the appellant.

See appellant's claims for refund (R. pp. 38, 42; fols. 113, 114, 125, 126); his statutory petition to review the assessment (R. p. 11; fol. 33); the decision of the Appellate Division of the Supreme Court of New York (R. p. 81; fol. 243); the amended remittitur of the Court of Appeals at R. p. 88 and Statement as to Jurisdiction on Appeal previously filed in this Court and separately printed.

*Mayflower Farms, Inc.*, v. *Ten Eyck*, 297 U.S. 266.

*Atlantic Lumber Co.* v. *Comm. of Corporations & Taxation*, 298 U.S.—, 80 L.E. 908.

The final order and judgment sought to be reviewed was entered June 1, 1936 (R. p. 90), upon remittitur from the

Court of Appeals as amended (R. pp. 86, 88). The petition for appeal was presented and allowed June 16, 1936 (R. p. 92).

Further consideration of the question of the jurisdiction of this Court and of the respondents' motion to dismiss or affirm was postponed to the hearing of the case on the merits by order entered in this Court on October 12, 1936.

### The Question Presented.

The appeal presents the question of the validity of a New York tax upon "income from property owned in New York" levied by the respondents against the appellant, a resident of Massachusetts who never had a domicile or place of business in New York and never carried on business there, on profit resulting to him from the sale in 1929 of a fraction of his membership in the New York Stock Exchange, an unincorporated association organized in 1799.

The tax statute, sections 351 and 351-a of the New York Tax Law, is assailed upon the ground that, as applied, it violates the due process clause of the Fourteenth Amendment of the Constitution of the United States. The proceeding was a statutory one, instituted by appellant in the Supreme Court for Albany County, New York, to review the assessment made for the year 1929. The Appellate Division of that court and the New York Court of Appeals affirmed the tax.

### The New York Tax Statute Involved.

The sections 351 and 351-a involved in this cause are part of the New York State Income Tax Law, being article 16 of the State Tax Law, chapter 60 of the Consolidated Laws of New York, and may be found in book 59 of McKinney's Consolidated Laws of New York, Annotated, at pages 643

and 644, or in Cahill's Consolidated Laws of New York, 2d Edition (1930), chapter 61, pages 2388 and 2389. They are as follows:

"§ 351. **Imposition of income tax.** A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars, but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, and for any taxable year ending during the year nineteen hundred and nineteen."

"§ 351-a. **Reimposition of tax against non-residents.** The tax provided for in section three hundred and fifty-one of this chapter, upon and with respect to income derived from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state, is hereby reimposed with respect to the taxable income for the calendar year nineteen hundred and nineteen and for any taxable year ending during the year nine-

teen hundred and nineteen, and for each year thereafter. Such tax shall be levied, collected and paid for the year nineteen hundred and nineteen, and returns with respect thereto shall be filed on or before June thirtieth, nineteen hundred and twenty, unless the time shall be extended as provided in this article."

**Statement of Facts.**

The New York Stock Exchange is an unincorporated association holding the beneficial ownership of the stock of the corporation owning the land and building in New York City where business on the Exchange is transacted. It is supported by dues and charges made against and paid by its members. Membership is evidenced by a certificate in the form of a letter signed by the secretary of the Exchange. It can be transferred only with approval of the Exchange (R. pp. 45, 53, 54; fols. 134-5, 157-8, 161).

In 1929 the Exchange increased its membership 25 per cent, from 1100 to 1375, by issuing in the nature of a stock dividend to each of its then members a so-called "right" representing one-quarter interest in a new membership, four of said "rights" together entitling the holder to one of the new memberships (R. p. 45; fol. 133). The "right" was evidenced by a letter from the Exchange secretary (R. p. 74; fol. 222). The appellant, a member of the Exchange and of the Boston firm of Whitney & Elwell since 1909, sold such right through the Exchange with its approval for $108,000, giving a power of attorney to a resident of New York to complete the sale (R. p. 75; fols. 223-4). The appellant's membership was an asset of his firm, the four partners having equal 25 per cent interests therein (R. p. 47; fol. 140). The tax in question was upon the single item of profit represented by the appellant's share of the difference between this sale price and one-fifth of the price origi-

nally paid for the membership plus capital additions (R. pp. 47, 48, 54; fols. 139, 144, 160). Never before or since this contested tax has the New York Tax Commission endeavored to tax the appellant or his partners.

The appellant and his partners have always been domiciled in Massachusetts. He and his firm have been in the securities business in Boston since the date of acquisition of his membership, with their only office there. Neither the firm nor any of its members has ever had an office, domicile or abode in New York, nor did they ever carry on business there. They did not buy and sell securities on the Exchange for their firm account (R. pp. 46-8, 59; fols. 137 to 142, 175).

The firm's business consisted almost entirely of commission orders from customers received at its Boston office for the purchase and sale of securities listed on the New York Stock Exchange. None of this was conducted by the appellant or members of his firm on the floor of the Exchange or in New York State; orders requiring execution on the Exchange were all telegraphed to independent firms, members of the Exchange who had business offices in New York and who executed and completed the orders on the Exchange in their own names as principals (R. pp. 49, 59; fols. 145-7, 177). These independent New York firms acted as correspondents for the appellant's firm, lending money on the security of the stocks purchased and other collateral delivered to them (R. pp. 48, 69, 70; fols. 142, 207-9).

The arrangements were substantially those of margin accounts carried by Whitney & Elwell with their correspondents on a written or oral agreement embodying the terms of Exhibit A, introduced at the hearing before the Tax Commission (R. pp. 50, 51, 69-72). Whitney & Elwell was a margin customer of the New York firms (R. p. 51; fol. 152). Neither the appellant nor his firm ever had anything to do with the execution or completion of the orders sent to New York (R. pp. 49, 64; fols. 146, 191). The margin

carried did not necessarily accord with the margin required by Whitney & Elwell from its customers (R. p. 61; fol. 183). The stocks purchased were usually left with the New York correspondents, but sometimes they were brought over to Boston and put in Whitney & Elwell's box or as collateral in a loan (R. p. 58; fol. 174). Each transaction was entered as a debit or a credit on the open running accounts carried by Whitney & Elwell with its correspondents. There was no check sent on each transaction (R. p. 61; fol. 181). This business of Whitney & Elwell involved approximately $150,000,000 worth of securities in 1929 (R. p. 66; fol. 198). The very small bank account carried in New York had nothing to do with this business and was carried only for convenience (R. p. 58; fols. 174, 175).

Whitney & Elwell's customers did their margin business on an agreement substantially similar to the Exhibit A, above referred to. It was not signed by the customer, but was contained in the printed matter on the confirmations sent to the customer reporting the execution of his order (Exhibits C and D (R. p. 73) introduced at the hearing before the Tax Commission, R. pp. 57, 60; fols. 171, 172, 180).

The Exchange rules prescribe a minimum commission which must be charged by all members for the execution of orders for non-members. By reason of the appellant's membership in the Exchange his firm is able to have their New York correspondents execute orders at 40 per cent of the commission fixed for non-members. Whitney & Elwell charges its customers the fixed minimum commission which the customer would have to pay any Stock Exchange house through whom he did business and pays 40 per cent of that commission to the New York correspondent who actually executed the order in New York, retaining the other 60 per cent as its compensation. This division of the commission was fixed by mutual agreement between Whitney &

Elwell and the New York firms which actually did the business (R. pp. 51, 52, 62, 67, 68; fols. 153-6, 184-9, 201, 202).

The appellant's profit on the sale of his "right" was required to be reported as taxable income at his domicile in Massachusetts, although deductions for other losses resulted in no Massachusetts tax being actually paid (R. pp. 36, 39; fol. 117).

**Errors to be Argued.**

As assigned (R. pp. 90, 91) it is urged that there were errors as follows:

1. In holding that the appellant, a resident of Massachusetts who never had an office or place of business in New York, was subject to income taxation under sections 351 and 351-a of the New York Tax Law on profit resulting from the sale of a fraction of his New York Stock Exchange membership.

2. In holding that the appellant's fractional Exchange membership which he sold in 1929 was "property owned" in New York.

3. In holding that the appellant's Exchange membership had acquired a "business situs" in New York sufficient to permit profit from the sale of a fraction thereof to be taxed as income "from property owned" in New York.

4. In failing to reverse the order of the Supreme Court Appellate Division, Third Judicial Department, and the determination of the respondents because the tax levied against appellant was unconstitutional and void as beyond the jurisdiction of New York.

## Summary of Argument.

**I. In the absence of a situs for his Exchange membership created by the carrying on of business in New York, that state has no jurisdiction to tax the appellant.**

The contested tax was levied and is supported as tax on income "from property owned" in New York—not as a tax on business carried on in New York. A New York Stock Exchange membership is intangible personalty; not an incorporeal hereditament, and therefore it is subject to property taxation only at its situs, the owner's domicile. Unless the appellant's membership acquired a "business situs" in New York as a result of the appellant carrying on business there, the jurisdiction to tax appellant's profit resulting from the sale of his fractional membership was with the state of his domicile, not with the respondents. Intangibles owned by and profit resulting to non-residents from their sale are, respectively, property and income at their situs, the domicile of their owner. They cannot be taxed at the same time for the same reasons by two states. New York has no jurisdiction to tax them.

**II. The appellant's membership had not acquired a "business situs" in New York.**

This Court will itself inquire as to the existence of such a situs. It is a manifest contradiction to support a "business situs" where no business is carried on. The cases establishing "business situs" do not cover the appellant's case. The decision in *Rogers* v. *Hennepin County*, 240 U.S. 184, when correctly analyzed, and particularly in the light of subsequent decisions of this Court, does not govern the appellant's case. There is no reason or decision supporting a "business situs" in New York for the appellant's membership.

**III. The unsoundness of the respondents' position.**

There can not be a dual situs regardless of business transacted. The appellant is not a partner in a New York enterprise. He was not taxed as such. Neither he nor his firm were carrying on business there. Illustrative analogies clearly support the appellant's position.

**IV. Conclusion.**

## Argument.

**I. In the Absence of a Situs for his Exchange Membership Created by the Carrying on of Business in New York, that State has No Jurisdiction to Tax the Appellant.**

The tax levied against the appellant was assessed against him on the ground that in 1929 he had income "from property owned" in New York. The respondent Tax Commissioners have never, before or since the tax here involved endeavored to impose an income tax on the business of the petitioner or his firm. They do not attempt to sustain the instant tax under the second clause of the taxing language as a tax upon the appellant's income from a business "carried on in this state." Obviously the appellant's firm, Whitney & Elwell, were not carrying on a business in New York by any definition.

> *Bank of America* v. *Whitney Bank*, 261 U.S. 171.
> *Hovey* v. *DeLong Hook & Eye Co.*, 211 N.Y. 420.
> Article 415 of the Regulations of the New York State Tax Commission contained in Manual 32 issued by said Commission and printed in Appendix, page 29, *infra*.

Although actual transfer of the fractional membership or "right" was concluded in New York, this cannot sus-

tain the respondents' position, because the tax assessed is an income tax and not a tax upon a sale or transfer.

> See Article 416 of the Regulations of the Tax Commission, quoted in Appendix, pages 29-30, *infra,* which declares that profits of a non-resident on sales of securities, even though consummated in New York, are not taxable except to the extent to which they are a part of a business carried on in New York.

The legal nature of a New York Stock Exchange membership or "right" is substantially identical with that of shares in a close corporation. They were represented by letters from the Exchange secretary similar to certificates of stock. The member's rights and duties under the constitution and rules are like those of a stockholder. The member's interest, entitling him to a proportional part of the benefits and effects of the organization when dissolved, after payment of its debts, was like ownership of corporation shares, intangible property which attached to the person of the owner in the state of his domicile. *Rhode Island Hospital Trust Co.* v. *Doughton,* 270 U.S. 69, 81; *Eisner* v. *Macomber,* 252 U.S. 189, 213-214. The restrictions on transfer do not change this. *Ripin* v. *United States Woven Label Co.,* 215 N.Y. 442; *Barrett* v. *King,* 181 Mass. 476. The "right" which gave the owner and three other members the power, subject to by-law restrictions, to add a new member to share the benefits and duties was even more in the nature of a personal intangible chose in action attaching solely to the owner's person.

This Court has determined a New York Stock Exchange membership to be intangible personalty, subject to local property taxation at the Ohio domicile of the owner. The contrary theory that an Exchange membership was so bound up with the physical location of the Exchange as

to be like real property, and consequently subject to property taxation only in New York, was rejected. Thus it has been authoritatively decided by this Court that a New York Stock Exchange membership is property owned at the owner's domicile in Ohio, not in New York. So the appellant's membership and fractional "right" are property owned at his domicile in Massachusetts.

> *Citizens National Bank* v. *Durr,* 257 U.S. 99. See particularly page 109, where it is pointed out that, if the membership had been held an incorporeal hereditament owned in New York, it would have had a taxable situs *only* in New York. *Louisville & Jeffersonville Ferry Company* v. *Kentucky,* 188 U.S. 385.

Recent decisions of this Court definitely overruling at least one earlier case * have made it clear that acquisition of a "business situs" in a state other than that of the domicile of the owner is the only basis for taxation of intangible personalty elsewhere than at the owner's domicile. In the absence of such a "business situs," the only state which has jurisdiction of intangibles for purposes of taxation is the state of the owner's domicile, where by force of the maxim *mobilia sequuntur personam* the intangible property is owned and has its situs.

> *First National Bank* v. *Maine,* 284 U.S. 312, holding shares of a domestic corporation owned by a non-resident decedent not subject to local death transfer taxation, where it was said, p. 331:
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> "We do not overlook the possibility that shares of stock, *as well as other intangibles, may be so used* in a

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* *Blackstone* v. *Miller,* 188 U.S. 189, permitting a local tax on bank deposits owned by a non-resident on the theory that the taxing state had some part in protecting the intangible and hence power to tax it, stated to be no longer law in *Farmers Loan & Trust Co.* v. *Minn.,* 280 U.S. 204, at 209.

state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property." (Italics ours.)

*Beidler* v. *South Carolina Tax Comm.*, 282 U.S. 1, reversing the South Carolina courts and holding an Illinois majority stockholders' loan to a South Carolina corporation not subject to death transfer tax, as no "business situs" was shown.

*Baldwin* v. *Missouri*, 281 U.S. 586, holding cash in banks, bonds and notes secured by local mortgages, all kept in Missouri but owned by a non-resident not subject to death transfer tax in Missouri.

*Farmers Loan & Trust Co.* v. *Minn.*, 280 U.S. 204, holding bearer and registered obligations of Minnesota or its municipalities owned by a non-resident and not there used in a business not subject to taxation in Minnesota.

The principle underlying these cases is applied as the general rule as to intangible property and yields only to established facts of *legal* ownership, actual presence and control elsewhere or in cases where its application would result in unreasonable and patent injustice. *Safe Deposit & Trust Co.* v. *Virginia*, 280 U.S. 83, 93, 94. That decision does not affect this appellant's case, because the legal title and beneficial ownership of his membership and "right" are both in him in Massachusetts.

Unless the facts show that an intangible has acquired "business situs" in New York, the above cases make it clear that it is beyond that state's jurisdiction under the Federal Constitution to tax profit resulting to a non-resident from the sale of intangibles owned by him as income from "property owned in" New York.

It is manifestly inconsistent to say that two states can at the same time tax the same property as property owned

in both states. The property is owned and taxable in one place only. In the nature of things it cannot be simultaneously owned and taxed in two states on the same theory.

> *Frick* v. *Pennsylvania*, 268 U.S. 473.
> *R.I. Hospital Trust Co.* v. *Doughton*, 270 U.S. 69, *supra*.

Paraphrasing the language of this Court's opinion in *First National Bank* v. *Maine*, 284 U.S. 312, *supra*, at the bottom of page 326 and top of page 327, due regard for the processes of correct thinking compels the conclusion that a determination fixing in one state the local situs of a thing for the purpose of determining ownership carries with it an implicit denial that there is a local situs in another state for the same purpose.

For New York to have jurisdiction simultaneously with Massachusetts to tax, as income from "property owned in" New York, profit resulting from the sale of an intangible which by decision of this Court (*Citizens Nat. Bank* v. *Durr*, 257 U.S. 99, *supra*) has been determined to be owned in Massachusetts necessarily involves the application of "inconsistent principles." The view that two states both have power to tax the same thing "on different and inconsistent principles" has been "distinctly rejected."

> *First National Bank* v. *Maine*, 284 U.S. 312, *supra*, bottom of page 324.

It might not be inconsistent legal theory to hold that the net rental received at the owner's domicile from foreign real estate is income subject to tax at the owner's domicile. It is clearly inconsistent legal theory to say that profit from the sale of an intangible is both income in the state of the appellant's domicile and simultaneously, irrespective of a "business situs," income of the owner in another state whose only connection with the intangible

was the fact that the issuer thereof was organized under its laws.

Being an intangible, the appellant's Exchange membership and "right" were property owned and taxable at their situs, the appellant's domicile in Massachusetts. They were not "property owned" in New York, particularly in this case, where the appellant was a complete non-resident without home or business in New York, and so New York cannot have jurisdiction to tax them as property owned there.

The question presented is not one of double or multiple taxation. It is a question solely of New York's jurisdiction to tax and its inability under the Federal Constitution to levy the contested tax because there was no "property owned" there, income from which could be taxed. General statements from opinions* of this Court to the effect that there is nothing in the Federal Constitution or its Fourteenth Amendment preventing double taxation by two or

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* See *Kidd* v. *Alabama*, 188 U.S. 730, at 732; *Hawley* v. *Malden*, 232 U.S. 1, at 13; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U.S. 54, at 58; *Coe* v. *Errol*, 116 U.S. 517; *Baker* v. *Druesedow*, 263 U.S. 137; *Cream of Wheat Co.* v. *Grand Forks County*, 253 U.S. 325; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U.S. 350, at 367-8. It should be noted that none of these cases actually involved multiple taxation in the strict sense—*i.e.*, taxation by more than one state of the same thing on a legal theory inconsistent with the theory of taxing the same thing in another state. Thus in *Kidd* v. *Alabama*, the tax upheld was a death duty on shares in non-resident companies owned by a resident, and there was no tax elsewhere on a theory inconsistent with that applied—that intangibles are for taxation purposes situated at their owner's domicile. In *Hawley* v. *Malden*, a Massachusetts income tax on dividends received by a resident from foreign corporations not doing business in Massachusetts was upheld and there was no showing of another tax on an inconsistent theory. It was specifically stated (232 U.S. p. 13) that the Court did not decide whether "a provision by the State of Incorporation fixing the situs of the shares for the purpose of taxation in that state by whomever owned, would exclude the taxation of the shares by other states in which their owners reside." In *Coe* v. *Erroll* the

more states are not in point, for the issue here is one of jurisdiction to tax, not double taxation.

One of these opinions, that in *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U.S. 54, sustaining a Kentucky property tax on a resident's bank credits in Missouri, is particularly illustrative in the case at bar. In stating that "liability to taxation in one state does not necessarily exclude liability in another," this Court there noted that the same credits could have been taxed in Missouri under the decided cases of "business situs" which are discussed under Part II of this brief, pages 18 to 20 (*Liverpool & L. & G. Ins. Co.* v. *New Orleans,* 221 U.S. 346; *Metropolitan Life Insurance Company* v. *New Orleans,* 205 U.S. 395). The second taxation in Missouri depends upon the acquisition in Missouri, by use there, of a "business situs" for the credits. With the acquisition of such a situs the second tax is upon a theory which is not inconsistent with the first tax at the owner's domicile, so the Fourteenth Amendment does not prevent it. Without the acquisition of such a "business situs," identical bank credits have been held "not within Missouri for taxation purposes." *Baldwin* v. *Missouri,* 281 U.S. 586, at 593, *supra.*

The taxation of intangibles or profit resulting from their sale elsewhere than at the owner's domicile would disregard this clear holding as well as those of *Farmers Loan & Trust Co.* v. *Minnesota* and *First National Bank* v. *Maine,* on which it is based.

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tax was on a non-resident's tangible property in the taxing state. There was no tax on the same property elsewhere. The other tax involved was of the taxpayer's business at his residence which does not involve any theory inconsistent with the taxation of tangibles by the state where they are. *Baker* v. *Druesedow* involves only the method of assessing local property taxes; *Cream of Wheat Co.* v. *Grand Forks County* and *St. Louis Southwestern Ry. Co.* v. *Arkansas* involve local franchise taxes measured by property outside the state. Conflicting taxes levied on inconsistent theories were not presented by the facts in those cases.

There is no decision of this Court sustaining in the absence of a "business situs" the validity of a state income tax on profit resulting to non-residents from the sale of intangibles. *People, ex rel. Blagden,* v. *Lynch* and *People, ex rel. Sackett,* v. *Lynch,* 291 U.S. 652; 292 U.S. 602, 608, dismissing appeals from 238 App. Div. 881; 263 N.Y. 568, are not such authority, because the appellant taxpayers in both cases, although non-residents, had business offices in New York, carried on business there and paid uncontested income taxes thereon in addition to the contested assessment on their Exchange membership sale profits. The memberships in those cases clearly had acquired "business situs" in New York because they had been used by the owners as part of their business in personally executing orders on the floor of the Exchange. That the tax in those cases was explicitly rested on the acquisition of such a "business situs" appears from the notice of assessment in the *Blagden* case (*Blagden* record, fol. 113) and from the hearing in the *Sackett* case (*Sackett* record, fol. 136).

*Shaffer* v. *Carter* and *Travis* v. *Yale & Towne Manufacturing Co.,* 252 U.S. 37 and 60, sustaining income taxes on non-residents, concerned only business carried on and real or tangible property owned by non-residents in the taxing state. In *Shaffer* v. *Carter, supra,* at page 57, it was stated that the jurisdiction of a state to tax non-residents "extends only to their property owned within the state and their business, trade, or profession carried on therein."

It follows that New York has no jurisdiction to levy the contested tax unless a "business situs" was acquired there by the appellant in 1929. Such an inability to tax is not cured by the provisions of the law allowing credit to non-residents for taxes paid to their home states.

*First National Bank* v. *Maine,* 284 U.S. 312, *supra,* where identical provisions for credit were not permitted to validate the tax.

**II. The Appellant's Membership had Not Acquired a "Business Situs" in New York.**

This Court will itself inquire as to whether the facts presented are sufficient to give the intangible a "business situs."

> *Beidler* v. *South Carolina Tax Comm.*, 282 U.S. 1, *supra,* where determination of the state courts that there was a "business situs" was reversed.

It seems manifest contradiction to support the result in the case at bar upon a theory of "business situs" in New York when it is clear and admitted that neither the appellant nor his firm were doing a taxable business there on any conceivable theory. *Bank of America* v. *Whitney Bank,* 261 U.S. 171, *supra.*

"Business" carried on elsewhere certainly cannot give a "business situs" in New York. When used by itself and when used with "situs," the word "business" must have approximately the same meaning. None of the decided cases in this Court indicate "business situs" is established by facts such as those existing in the case at bar.

The only authoritative cases in this Court which sustain taxation of intangibles elsewhere than at the owner's domicile on the ground of a "business situs" acquired there, are based on the personal use or employment of the intangibles in business carried on in the second state. Such cases are:

> *New Orleans* v. *Stempel,* 175 U.S. 309, where a non-resident conducted a business of loaning money on Louisiana real estate, through an agent there.
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> *Bristol* v. *Washington County,* 177 U.S. 133, an identical case except that the evidences of the credits were payable to the non-resident owner and custody of them was not continuously kept by the local agent.

*State Board of Assessors* v. *Comptoir National,* 191 U.S. 388, where a non-resident company carried on a local loan business through an agent who had custody of the evidences of the credits.

*Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U.S. 395, a similar case except that the notes were not continuously in the local agent's custody although they were whenever needed for the purposes of the business.

*Scottish Union & National Ins. Co.* v. *Bowland,* 196 U.S. 611, where bonds deposited with the State of Ohio under its laws regulating the doing of insurance business there were held subject to taxation there.

*Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors,* 221 U.S. 346, where extensions of premium credits granted to local policyholders as a part of the business of a non-resident company qualified to do business there were held subject to local taxation.

*Rogers* v. *Hennepin County,* 240 U.S. 184, which sustained a property tax on memberships in a Minneapolis Exchange, in a case where the pleadings admitted personal use of the Exchange membership in business there, and where this Court stated (240 U.S. 191): "But it sufficiently appears from the allegations that the memberships represented rights and privileges *which were exercised in transactions at the Exchange in the City of Minneapolis,* and, we are of the opinion, applying a principle which has had recognition with respect to credits in favor of non-residents arising from business within the State, and in the case of shares of stock of domestic corporations, that it was competent for the State to fix the *situs* of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the State where the exchange was located." Citing *Tappan* v. *Merchants National Bank,* 19 Wall. 490;

*Corry* v. *Baltimore,* 196 U.S. 466, and some of the cases listed on the preceding page hereof.

*Wheeling Steel Corp.* v. *Fox,* 298 U.S. 193, where a Delaware corporation was held to have acquired a "business situs" in West Virginia where was situated its head office controlling widespread activities and credits.

In all of these cases either the owner of the intangible personally used it in the state where "business situs" was established, or the evidences of the intangibles were physically present there or were managed there by the owner himself or by a general agent who had general authority to deal with them. In the appellant's case the owner was not in New York and did not personally use the intangible there. The only connection the appellant had in New York was with independent brokerage firms doing business there, who took and executed in their own names orders received from the appellant's firm, were paid for each item of service rendered in New York and who had no authority to deal with the appellant's property and did not purport in any way to do so.

These independent contractors took and executed the orders of the appellant's firm. They did not have possession or control of Whitney & Elwell's credits. All Whitney & Elwell had in New York were debts due to their correspondents secured by pledge of shares, bonds or other intangibles which did not belong to them but were held by them for their customers' accounts. The property claimed to be owned in New York, so that its sale created the tax contested, is not these intangibles in New York to secure loans; it is the appellant's Stock Exchange membership or fractional "right," neither of which was ever personally used there or even physically present there except when the "right" was sold through a special agent.

In such circumstances there is no "business situs" in New York. Such a situs arises only from the conduct of business within a state, and where no business is so conducted, there is no peg on which to hang the "business situs." *Cessante ratione legis, cessat et ipsa lex.* See *Newport Company* v. *Wisconsin State Tax Commission* 219 Wisc. 293; 261 N.W. 884; cert. den. 297 U.S. 720, in which, applying the principles of the above cases, a state income tax assessment was held invalid against a Delaware corporation doing business in Wisconsin on the ground that there was no "business situs" for the items involved. The items so held to be without "business situs" were profit resulting from (1) the sale of intangible securities; and (2) the sale of patent rights developed as a by-product of research work in the company's laboratories in Wisconsin, both of which were held to be income at the corporation's domicile not in Wisconsin.

With particular reference to the decision of *Rogers* v. *Hennepin County,* 240 U.S. 184, *supra,* and the principle there applied in accordance with the quotation set out above at the bottom of page 19, it is important to note the following three facts which show clearly that the decision is not controlling authority in the case at bar.

1. New York has definitely not fixed the situs of memberships for the purpose of taxation at the place where the Exchange was located. In fact, New York Stock Exchange memberships are not subject to a personal property tax even to resident owners, because the Personal Property Tax Law does not attempt to reach them. New York Tax Law, chapter 60, article 1, section 2(8) and section 4-a; *People, ex rel. Lemmon,* v. *Feitner,* 167 N.Y. 1, 7, 60 N.E. 265, 267; *Matter of Hellman,* 174 N.Y. 254, 256, 66 N.E. 809.

The appellant's case and the *Rogers* case therefore stand on very different bases, because in the latter a local statute has determined a situs for property taxation to both resi-

dents and non-resident owners, while in the former the local statute has not determined a personal property tax situs even for resident owners.

2. The appellant never used his membership personally to execute any orders, whereas paragraph 11 of the amended bill in the *Rogers* case admitted such a personal use by the taxpayers there and did not present the fact, which exists in the case at bar, that the non-resident's membership was involved only in connection with orders for non-resident customers.

3. Since the decision in the *Rogers* case this Court has ruled that two states cannot tax the same thing at the same time on inconsistent legal theories. It follows that, so far as the *Rogers* case stands for the general proposition that, irrespective of statute determining situs for all concerned,* Minnesota can tax as property owned there an Exchange membership owned elsewhere, it, like *Blackstone* v. *Miller*, 188 U.S. 189, *supra*, is limited by the decisions and theories of *First National Bank* v. *Maine*, 284 U.S. 312, *supra*; *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U.S. 204, *supra*, and *Baldwin* v. *Missouri*, 281 U.S. 586, *supra*.

In the situation at bar the real estate and business of the Exchange are taxed in New York to the New York corporation which owns the market place (articles 1, 2, 9, 9a and 9b of the New York State Tax Law, chapter 60 of the Consolidated Laws of New York). As one of the persons for whose benefit are held the shares of this corporation the appellant bears part of the burden of taxation by New York. The actual business of executing orders and carrying securities on margin there is taxed to the New York correspondents of the appellant's firm, who have the offices and do the business there (article 16, section 351, of the

* Such as the National Banking Act provisions sustained in *Tappan* v. *Merchants Nat. Bank*, 19 Wall. 490, *supra*, or the Maryland statute upheld in *Corry* v. *Baltimore*, 196 U.S. 466, *supra*.

New York State Tax Law). The petitioner owned no property in New York and carried on no business there. There is no reason or occasion whatever to make him share directly in the cost of government there.

Unless the standards of facts which can create a "business situs" are to be extended far beyond those set by the decided cases, neither the appellant's membership nor his "right" had any "business situs" in New York. There is no authority for such extension. Nor is there any occasion so to extend them, because the whole theory of taxation based upon the acquisition of a "business situs" is to see that business or property used or in a state does not escape contribution to the cost of government because of its ownership elsewhere.

The fact that the appellant's firm exercised its opportunity, resulting from ownership of the appellant's membership, to have the orders of its non-resident customers executed in New York by other independent Exchange members at less than what the customers were charged is the only thing upon which the respondents can rest their claim of "business situs." This cannot be sufficient, because exercise of that opportunity is very far from any activity which has been or should be called "business" for taxation, service of process or any other purpose. It is inconceivable, for instance, that a Massachusetts business man can be said to be doing business in New York on the sole ground that he had and exercised the rights given him by a contract with a New York business man for preferential rates for services rendered in New York by that New York man in the name and with the capital of that New York man.

*Wheeling Steel Corp.* v. *Fox*, 298 U.S. 193, *supra*, apparently relied on by the respondents, is in reality authority for the appellant because all of the elements of control which established the essential "business situs" in West Virginia are, so far as applicable in the case at bar, ele-

ments of control peculiar to and localized with the appellant in Massachusetts. None of the items which showed a "business situs" in the *Wheeling Steel* case to be in West Virginia exist in New York in the case at bar to give color to the suggestion that the appellant's membership or "right" had a "business situs" there.

Without such a "business situs" the tax on the appellant is invalid.

### III. The Unsoundness of the Respondents' Position.

The respondents endeavor to meet in three ways the manifest contradiction involved in saying that the appellant's membership had a "business situs" in New York, where the appellant carried on no business.

First, it is urged that an Exchange membership is property *sui generis* so bound up with the locality of the Exchange facilities and building that it has, in addition to situs at its owner's domicile, an additional or dual situs in New York, regardless of the transaction of business in that state. This is only a resurrection of the minority "doubts" in *Citizens National Bank* v. *Durr*, 257 U.S. 99, *supra*, and is therefore untenable.

Second, it is urged that the appellant was co-owner with the 1099 other members of the Exchange's property, and hence a partner in the business of operating a Stock Exchange in New York. As the property in New York, where the Exchange is located, is owned by a New York corporation, this is the same argument which was regarded as untenable by this Court in *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U.S. 69, *supra*. There, in holding shares of a non-resident shareholder, deceased, not taxable by North Carolina, in which state was located the principal business and over 66⅔ per cent of the assets of the corporation, this Court repudiated "the theory that the stock-

holder is the owner of the property of the corporation, and the state which has jurisdiction of any of the corporate property has *pro tanto* jurisdiction of his shares of stock." 270 U.S. at 81. Furthermore, the Exchange is a membership and not a profit association; membership may be an incident of the member's business, but is not a business in itself. "The New York Stock Exchange transacts no business as such in the buying and selling of stocks. * * * The business therein transacted is that of the individual members." *People, ex rel. Lemmon,* v. *Feitner,* 167 N.Y. 1, 5, 60 N.E. 265, *supra.* Ownership of the Exchange building is certainly not a business of the members, since that is vested in a domestic corporation, taxable and taxed as such.

Furthermore, the respondents did not assess this contested tax as the appellant's share of income from the Exchange as a partnership. The Exchange does not file returns as a partnership under the applicable sections of the State Tax Law (chapter 60 of the Consolidated Laws of New York, article 16, section 364). The tax contested in this proceeding arose from the business of the partnership of Whitney & Elwell, which was conducted only in Boston (see appellant's tax return, R. p. 33). It cannot be sustained on some other theory. As pointed out above, page 11 of this brief, the Exchange membership is far more similar to a close stock corporation share than anything else. A non-resident stockholder is not subject to income tax for profit from the sale of his shares in the state where the corporation has its offices. *Rhode Island Hospital Trust Co.* v. *Doughton,* 270 U.S. 69, *supra.* Yet that is the logical result of this second suggestion of the respondents.

Third, it is urged that the activities of the appellant's firm in dealing with or having its orders executed by its New York correspondents constituted a business of the

appellant in New York. This cannot be so, both because the respondents themselves make no effort to tax the appellant for the profit resulting from those activities, and also because of this Court's decision in *Bank of America* v. *Whitney Bank,* 261 U.S. 171; *supra,* where very similar transactions were held not to constitute business for the purposes of service of process. If the correspondents' activities are not the non-resident's business for purposes of service of process or taxation, clearly they are not business sufficient to make valid an extraterritorial tax on an intangible by giving it a "business situs." An application of this suggestion would reach the impossible result of making every non-resident individual regularly giving, from points outside New York, orders for purchase and sale on the New York Exchange taxable in New York on his profits. The New York correspondents were independent contractors carrying on their business in New York. Their acts were not the acts of the appellant. The relationship between them and the appellant's firm was that of independent contractors as distinguished from one of principal and agent.

Three analogies existing between the appellant's case and hypothetical cases where clearly no tax could be exacted also illustrate the unsoundness of the respondents' position. The first analogy is the case of a resident of Connecticut who owned a large number of shares of the New York Telephone Company. Assume also, to make the analogy complete, that this man had free telephone service at his home in Connecticut, analogous to the fact that the appellant's firm could have orders executed on the Exchange by other members for less than a non-member. It is clear that New York could have no jurisdiction to tax this resident of Connecticut for profit resulting from the sale of his holdings in the New York Company or of rights or stock dividends received through his ownership of those

shares, even though he was taxable by New York on his salary earned and paid to him for services in New York (see article 416 of the Regulations of the New York State Tax Commission, printed in Appendix, *infra*, pp. 29-30). The only difference between that hypothetical case and the case of this appellant in New York is in the latter's favor, because he never did business and was not otherwise taxable there.

The second analogy is that of a non-resident owner of a life insurance policy with cash surrender value payable only at the insurer's office in New York. If the insured sells and assigns his policy for more than the cash surrender value, he has made a profit from the sale of an intangible payable only in New York, yet it is inconceivable that the profit is taxable as from property owned there.

The third is that of a Massachusetts business man who purchased the seating rights in a section of the grandstand where the world's series baseball games were to be played in New York and resold in Massachusetts tickets in that section at a profit to himself. The income resulting to the Massachusetts resident from this business is income at his domicile and clearly without New York's jurisdiction to tax.

## IV. Conclusion.

The appellant's Exchange membership is intangible personalty with its situs at his domicile in Massachusetts. In order for a state other than Massachusetts to have jurisdiction to tax profit resulting from its sale as income from property owned there, the membership must have acquired a "business situs" in the other state.

There cannot be any business situs in New York unless business has been carried on there. Business carried on elsewhere certainly cannot create a business situs in New York.

The appellant and his firm, however their connection with their New York correspondents is described, were not by any definition carrying on business in New York. The applicable definition in Tax Regulations, article 415, does not include the appellant or his firm. The respondents never attempted to tax them on that basis. The requirements for determining whether or not the appellant or his firm conducted business in New York must be similar to those used in determining whether a taxable business was done there. It is a manifest contradiction to suggest that the word "business" can mean one thing when used alone and another when used with "situs."

There being no business carried on by the appellant or his firm in New York, there could be no "business situs" for his intangible property there, and hence nothing, profit from whose sale New York can tax as income from property owned there.

JOHN L. HALL,
MARCIEN JENCKES,
CLAUDE R. BRANCH,
RICHARD WAIT,
Attorneys for the Appellant.

CHOATE, HALL & STEWART,
30 State Street, Boston,
CLARK, CARR & ELLIS,
120 Broadway, New York,
Of Counsel.

## APPENDIX.

## REGULATIONS PROMULGATED BY THE TAX COMMISSION IN PURSUANCE OF SECTION 383 OF THE TAX LAW AND CONTAINED IN MANUAL 32 ISSUED BY THE STATE TAX COMMISSION.

"ART. 415. **Definition of 'business carried on' within the State.** A business, trade, profession or occupation (as distinguished from personal service as employee) is carried on within the state by a nonresident when he occupies, has, maintains or operates desk room, an office, a shop, a store, a warehouse, a factory, an agency or other place where his affairs are systematically and regularly carried on notwithstanding the occasional consummation of isolated transactions without the state. This definition is not exclusive. Business is being carried on if it is here with a fair measure of permanency and continuity. A taxpayer may enter into transactions for profit and yet not be engaged in a trade or business. If a taxpayer pursues an undertaking constantly as one relying on his profit therefrom for his income or part thereof he is carrying on a business or occupation. Thus a 'trader' in securities who trades regularly and constantly on his own account and makes it his business to trade as another makes it his business to run a mercantile establishment is carrying on a business or occupation. Its regularity or continuity need not be for a long period; the life of the business is not a material factor."

"ART. 416. **Sale of stocks, bonds and other securities.** Gains and profits of a nonresident from the sale, exchange or other disposition of stocks, bonds and other securities are not taxable and should not be included in gross income, except to the extent to which the same shall be a part of the income from a business carried on in the State of New

York, even though the sale or other disposition thereof may have been made within the State of New York or consummated on an exchange located within such state. Likewise, losses sustained from the sale, exchange or other disposition of stocks, bonds and other securities under like conditions are not deductible, except to the extent that they may be losses incurred in a business carried on within the state."

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CHARLES EL

# Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 218.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. C. HANDASYDE WHITNEY,
*Appellant,*

*v.*

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, AS TAX COMMISSIONERS OF THE STATE OF NEW YORK,
*Respondents.*

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

---

## REPLY BRIEF FOR THE APPELLANT.

JOHN L. HALL,
MARCIEN JENCKES,
CLAUDE R. BRANCH,
RICHARD WAIT,
*Attorneys for Appellant.*

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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# Supreme Court of the United States.

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THE PEOPLE OF THE STATE OF NEW YORK, EX REL. C. HANDASYDE WHITNEY,

*Appellant,*

*v.*

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, AS TAX COMMISSIONERS OF THE STATE OF NEW YORK,

*Respondents.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

## REPLY BRIEF FOR THE APPELLANT.

### The Facts Involved.

The respondents on page 2 of their brief take exception to the appellant's statement on page 6 of his brief that the New York correspondent firms of the appellant having business offices in New York who executed orders on the

Exchange for the appellant's firm did so "in their own names as principals . . ."

While it is true that the arrangements between the appellant's firm and the New York correspondents were set forth in a letter entitled "Customers' Agreement," being Exhibit A (R. pp. 69-72), which refers to the New York correspondents, addressees of the agreement, as "agents of the undersigned" (Exh. A; R. p. 69; fol. 207), it is also clear that in transactions of purchase or sale on the floor of the Exchange the name of the appellant's firm did not appear (R. 49; fol. 146). The New York correspondents bought and sold in their own name (R. p. 49; fol. 147). The appellant's firm had nothing to do with the payment, delivery and completion of the transactions in New York (R. p. 64; fol. 191). The appellant's firm was a margin customer of the New York correspondent (R. p. 51; fol. 152), the name of the appellant's firm appearing in the transaction only on the books of the New York correspondent (R. p. 49; fol. 147).

The respondents further state on page 3 of their brief that the appellant made a contribution to the Exchange for capital purposes in 1929. These contributions were made prior to 1929 (R. p. 53; fol. 159).

**The Error in the Respondents' Agency Argument.**

The respondents contend on pages 9 and 10 of their brief that the appellant's membership had a "business situs" in New York because the appellant was doing business there through an agent even though he never acted there personally. The argument assumes, correctly, that to establish a "business situs" in New York it is essential that the person whose property is said to have acquired the "business situs" shall have carried on business in New York and shall have used the property in that busi-

ness. Both elements are essential—business and the use of the particular property in the business. If either one is lacking, the property does not have the "business situs." The respondents' conclusion that the appellant or his firm was doing business in New York through the medium of an agent is unsound. An individual non-resident of New York who employs New York business men to buy or sell for him cannot, simply on that account, be regarded as doing business in New York.

A margin account of any non-resident of New York carried with one of the same firms that acted as the appellant's New York correspondent would be governed by the same agreement, Exhibit A (R. pp. 69-72), which the appellant's firm used. This clearly appears from the last paragraph of the agreement and the note thereto (R. p. 72; fol. 216) which made that paragraph inapplicable to the appellant's firm.

Obviously it cannot be said that the great multitude of persons living outside of New York who carry margin accounts for the purchase and sale of securities with New York brokerage houses are doing business in New York. They are not. It is the New York broker who does business in New York. And this situation remains the same whether he is denominated "agent" or anything else. The question is one of fact, and the fact is that the customer does business where he is and the broker alone acts in New York.

Suppose a Massachusetts corporation is required by its charter to do business only in Massachusetts: It would be absurd to say that the making by it of a contract like Exhibit A would be *ultra vires*, yet it would be if the contract meant that the corporation was to carry on business in New York. It would be equally absurd for New York to attempt to collect an income tax from all non-resident customers of New York brokers because section 351 of the income tax

law imposes a tax upon "the entire net income . . . from every business . . . carried on in this state by natural persons not residents of the state." New York has never attempted to collect such a tax from the appellant, but the present argument would require that it should.

There is no ground for distinguishing the appellant's situation from that of any other customer of a New York broker having a similar customer's agreement. The only difference is in the amount of commissions charged by the New York broker. In both cases the account is financed by the New Yorker's capital and all transactions are completed in his name. The amount of the compensation can not vary the situation. If the broker charges some customers less than others, it cannot affect the legal nature of the arrangements between him and his customers. The customer with a contract for the cheapest rate cannot be said to be carrying on business in New York while another customer on the same basis, but paying a higher commission for the service rendered, is not so carrying on business in New York. The making of such a contract is not carrying on business in New York. Neither is the exercise of the opportunity to have the New York contractor execute orders there. That the non-resident's contract rights are protected by New York law and enforceable in New York courts does not mean the non-resident is carrying on business there.

Such is the situation between the appellant's firm and the New York correspondents. That the appellant's membership gives his firm the opportunity to contract for lower rates of commissions than others is no basis for saying that the appellant was carrying on business in New York. The right to lower commissions could not make a business otherwise foreign to New York a New York business. It could be pertinent only on the question of whether assuming the existence of a business in New York the appellant used his

membership in that business. But that question does not arise, for the appellant was not carrying on a business in New York, and so the first requisite for "business situs" is lacking and there is no occasion to inquire further.

Respectfully submitted,

JOHN L. HALL,
MARCIEN JENCKES,
CLAUDE R. BRANCH,
RICHARD WAIT,
Attorneys for the Appellant.

CHOATE, HALL & STEWART,
30 State Street, Boston,
CLARK, CARR & ELLIS,
120 Broadway, New York,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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# No. 218

---

PEOPLE OF THE STATE OF NEW YORK ON RELATION OF C. HANDASYDE WHITNEY,

*Appellant,*

*against*

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, AS TAX COMMISSIONERS OF THE STATE OF NEW YORK,

*Appellees.*

---

APPEAL FROM THE SUPREME COURT, COUNTY OF ALBANY, STATE OF NEW YORK.

---

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

---

JOHN J. BENNETT, JR.,
*Attorney-General of the State of New York,*
*Attorney for Appellees.*
JOSEPH M. MESNIG,
*Assistant Attorney-General*
*of the State of New York,*
*Counsel for Appellees,*
*The Capitol, Albany, New York.*

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SUPREME COURT OF THE UNITED STATES

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# No. 218

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PEOPLE OF THE STATE OF NEW YORK ON RELATION OF C. HANDASYDE WHITNEY,

*Appellant,*

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---

APPEAL FROM THE SUPREME COURT, COUNTY OF ALBANY, STATE OF NEW YORK.

---

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

---

MAY IT PLEASE THE COURT:

Now come the appellees in the above entitled cause, by their counsel of record, and move that the appeal herein be dismissed, or that the judgments appealed from be affirmed.

## Statement of the Case.

This is a certiorari proceeding authorized by § 375 of the New York Tax Law and Article 78 of the New York Civil Practice Act. In the proceeding appellant seeks a review of a final determination of the State Tax Commission which, after a hearing and appropriate procedure, affirmed an assessment of additional income tax against appellant for the calendar year 1929.

Appellant was at all times a resident of the Commonwealth of Massachusetts and became, in 1909, the owner of a "seat" or membership in the New York Stock Exchange. He was a partner in a Boston brokerage firm known as Whitney & Elwell, which firm, in 1929, consisted of four partners, including appellant, all residents of Massachusetts. The "seat" was a firm asset, ownership being divided equally among the four partners (R. 136-141*).

In 1929, the membership of the Stock Exchange was increased from 1100 to 1375 and a "right", equal to one-fourth of a membership, was distributed to each of the 1100 original members. Appellant, in 1929, sold his "right" for $108,000.00, and upon the profit accruing to appellant therefrom, an income tax of $280.00 was assessed (R. 26).

Appellant effected the sale of his "right" through the Secretary of the New York Stock Exchange in New York and transfer was made by giving power of attorney to a New York firm (R. 222-224).

Whitney & Elwell transacted a general brokerage business in Boston, holding itself forth as a member of the New

---

* Folio references are to Record in New York Court of Appeals.

York Stock Exchange. Its bill-heads bore prominent notation of such membership (Exhibits B and C, Op., p. 72 R.). It executed its customers' orders for stocks listed on the New York Stock Exchange through other members who were engaged in brokerage business at New York City (R. 145-147). Under the rules of the Exchange it divided the commissions with the broker who executed the order on the floor of the Exchange (R. 153-156, 168-169).

Appellant's firm, in 1929, had an arrangement with three member-firms (R. 146) to execute its orders on the Exchange. Under such arrangement, the New York firm was constituted *the agent of appellant's firm* for the purpose of consummating purchases and sales on the New York Stock Exchange (R. 188, 205-216). The New York agent charged Whitney & Elwell forty per cent of the regular commission, while Whitney & Elwell charged its customer full commission, thus receiving net sixty per cent of the commission on purchases and sales executed in New York by its agent (R. 184-189).

In 1929, Whitney & Elwell dealt in approximately 3,000,000 shares listed on the Exchange, having an estimated value of $150,000,000.00 (R. 197-198). It also participated in certain syndicate participations with New York financial houses (R. 166, 193, 199).

The New York Stock Exchange is an unincorporated voluntary association, limited as to membership, governed by its own constitution, by-laws and rules, and holds the beneficial ownership of the entire capital stock of a New York corporation which owns the building in which the business of the Exchange is transacted, with the land upon which it stands, and which is situated in the City of New York (R. 134). A member may personally buy or sell only in the Exchange building, except that a member may buy or sell for the account of other members at a commission substantially less than that charged to a non-member.

Such rights and privileges are valuable and are exercisable only in transactions conducted at the New York Stock Exchange building in the City of New York (R. 135).

**State Statutes Involved.**

This cause involves the application of §§351 and 351-a of the New York Tax Law, quoted in part in appellant's statement as to Jurisdiction on appeal herein. Pursuant thereto, the New York personal income tax is imposed upon non-residents with respect to the income derived "from all property owned and from every business, trade, profession or occupation carried on in this State" by such non-residents.

These identical statutes were involved in two cases in which this Court dismissed appeals from decisions of the State courts which had upheld the action of the State Tax Commission in making assessments upon not dissimilar facts.

*People ex rel. Blagden* v. *Lynch*, 292 U. S. 602;
*People ex rel. Sackett* v. *Lynch*, 291 U. S. 652.

While these cases are distinguishable upon the ground that the appellants there had been engaged in the brokerage business in New York, the fact nevertheless remains that a tax was asserted upon both statutory bases; namely, that the profit there arising from the sale of memberships in the New York Stock Exchange constituted income from a New York business and constituted income from property owned in New York. Furthermore, in the *Blagden* case, it was a conceded fact that the appellant there had retired from business in New York on or before December 31, 1927, and had made no use of his membership for business purposes after that date. The sale of the membership took place in 1928. As in the instant case, no opinions were filed by the State courts.

## ARGUMENT.

### The Question Upon Which the Decision of This Cause Depends is so Unsubstantial as Not to Need Further Argument.

Appellees urged in the Court below that Appellant's membership and "right" constituted intangible personal property and, because of the facts and circumstances surrounding its use and of the rights and privileges which it conferred upon its owner, had a business situs in New York, thus subjecting it to taxation here.

*New Orleans* v. *Stempel,* 175 U. S. 309;
*Bristol* v. *Washington County,* 177 U. S. 133;
*Liverpool & L. & L. Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346;
*Citizens National Bank* v. *Durr,* 257 U. S. 99;
*Rogers* v. *Hennepin County,* 240 U. S. 184;
*Wheeling Steel Corp.* v. *Fox,* No. 663, October Term, 1935, — U. S. — (decided May 18, 1936).

Solely because of his membership, appellant has been able to conduct large and profitable transactions in securities in his Boston brokerage business. At all times possessed of the right to go upon the floor of the Exchange and personally conduct his firm's trading, he chose to carry on his operations through the medium of an agent located in this State.

Appellants' argument carries with it a tacit admission that, if appellant made personal use of his membership in New York, a business situs would result. If that be so, assuredly the identical result obtained through the medium of a New York agent must also attach a business situs in New York to the property.

In addition, under the decisions of the courts of this State, it would seem that, for most purposes, including

taxation, the New York Stock Exchange constitutes a partnership.

*Ludlum* v. *Wagner*, 212 App. Div. 779;
*Belton* v. *Hatch*, 109 N. Y. 593.

The matter is dealt with in the Personal Income Tax Regulations (Manual 34) promulgated by the State Tax Commission. Thus, Article 228 reads:

> "Association distinguished from partnership. An organization, the partnership interests in which are not transferable without the consent of the members, is a partnership and not an association. Any so-called association or organization not taxable under article 9-a of the tax law and not exempted under such article, will be regarded as a partnership within the meaning of the income tax law. The members of such partnerships will be required to include in their returns their share of the profits of such partnerships, whether distributed or undistributed. Such partnerships will be required to file returns in the same manner as all other partnerships."

It would seem to follow that, for at least the purposes of the New York personal income tax, the New York Stock Exchange constitutes a New York partnership. This brings us to the inevitable conclusion that appellant's membership, being a partnership interest in a New York business, constitutes property with a business situs in New York.

In any event the question here would appear to be conclusively controlled by the decision of this Court in *Rogers* v. *Hennepin County, supra.* That case involved the taxation of memberships in the Minneapolis Chamber of Commerce, as affecting members who were (1) residents of Minneapolis, (2) residents of Minnesota, outside of Minneapolis, and (3) residents of other States. With respect to all members residing outside of Minneapolis, it is stated

(p. 186) that such members did not operate upon the exchange personally, except at rare intervals, and that their use of their memberships was practically limited to dealing through other members at reduced rates, exactly as in the instant case.

This Court held that the memberships of such non-residents, nevertheless, were taxable at the place where the exchange was located. Mr. Justice Hughes wrote, page 191:

> "There is the further contention with respect to the authority of the State to tax the memberships owned by citizens of other states. It is urged that the memberships are intangible rights held by the member at his domicile. *But it sufficiently appears from the allegations that the memberships represented rights and privileges which were exercised in transactions at the Exchange in the City of Minneapolis, and we are of the opinion, applying a principle which has had recognition with respect to credits in favor of non-residents arising from business within the State,* and in the case of shares of stock of domestic corporations, that it was competent for the State to fix the situs of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the State where the exchange was located." (Emphasis ours.)

And, in *Citizens National Bank* v. *Durr, supra,* this Court held that Ohio might impose a property tax upon a membership in the New York Stock Exchange owned by a resident of Ohio, at the same time strongly intimating that New York might also tax the membership because of the rights and privileges localized there. In a vigorous dissent, Mr. Justice Holmes thought that the privilege of membership was so localized in New York as to vest exclusive jurisdiction to tax in that State.

We submit that this cause presents no question sufficiently substantial to warrant review by this Court.

## Opinions Below.

No opinion was written by either court below. The unanimous decision of the Appellate Division of the Supreme Court, Third Judicial Department, is reported in 246 App. Div. 652. The unanimous decision of the Court of Appeals is reported in 271 N. Y. mem. 90, and 271 N. Y. mem. 114.

Dated June 25, 1936.

JOHN J. BENNETT, JR.,
*Attorney-General of the State of New York,*
*Attorney for Appellees.*
JOSEPH M. MESNIG,
*Assistant Attorney-General of the State of New York,*
*Counsel for Appellees,*
*The Capitol, Albany, New York.*

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# Supreme Court of the United States

**OCTOBER TERM, 1936.**

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The People of the State of New York, *ex rel.*
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*Appellees.*

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APPEAL FROM THE SUPREME COURT, COUNTY OF ALBANY, STATE OF NEW YORK.

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## BRIEF FOR APPELLEES.

---

JOHN J. BENNETT, JR.,
*Attorney-General of the State of New York,*
*Attorney for Appellees.*

JOSEPH M. MESNIG,
*Assistant Attorney-General,*
HENRY EPSTEIN,
*Solicitor General,*
*Counsel for Appellees.*

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1936.**

**No. 218.**

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The People of the State of New York, *ex rel.*
C. HANDASYDE WHITNEY,

*Appellant,*

against

MARK GRAVES, JOHN P. HENNESSEY and JOHN J. MERRILL, as Tax Commissioners of the State of New York,

*Appellees.*

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## BRIEF FOR APPELLEES.

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### Opinions Below.

As stated in appellant's brief, no opinions were filed in the courts below and appellant has correctly set forth the reported decisions.

### Jurisdiction.

Appellees filed a motion to dismiss or affirm pursuant to Rule 12, paragraph 3, and, by an order entered by this Court on October 12, 1936, consideration thereof and of the question of jurisdiction was postponed to the hearing of the case on the merits.

## Statement of the Case.

The facts, as set forth in the "Statement of Facts" in appellant's brief, are generally correct and, with one exception and some addition, we adopt the same to avoid burdening the Court with reiteration.

The exception referred to relates to the statement (Appellant's Brief p. 6) that the Stock Exchange member firms having business offices in New York, who executed orders on the Exchange for appellant's firm, did so "in their own names as principals * * *."

On the contrary, it clearly appears that appellant's firm dealt with its three New York correspondents (R. 49) pursuant to the terms of a written contract (Exhibit A, R. 69-72), the particular contract offered in evidence being typical of all three (R. 50). By the terms of such contract, the New York member firm was specifically constituted the agent of appellant's firm for the purpose of consummating purchases and sales on the New York Stock Exchange (R. 63, 69, 71).

In addition, it is undisputed that a membership in the New York Stock Exchange carries with it valuable privileges and has a market value for the purpose of sale; that the New York Stock Exchange is an unincorporated, voluntary association, limited as to membership, governed by its own constitution, by-laws and rules; that such association holds the beneficial ownership of the entire capital stock of a New York corporation which owns the building in which the business of the Exchange is transacted, with the land upon which it stands and which is situated in the City and State of

New York; that a member may personally buy or sell only in the Exchange building; that a member of the Exchange may buy or sell for the account of other members at a commission substantially less than that charged to a non-member; that such rights and privileges are valuable and are exercisable only in transactions conducted at the New York Stock Exchange building in the City and State of New York (R. 45).

In 1929, appellant was required to make a contribution to the Exchange for capital purposes (R. 53). Appellant's firm also participated in eighty-eight different underwritings with New York financial houses (R. 56, 65, 67) and maintained a bank balance in New York (R. 58, 59).

## Summary of Argument.

I. Appellant so employed his membership in the New York Stock Exchange that it acquired a business situs in the State of New York and the profit derived by appellant from the sale of a fractional membership constituted taxable income in New York.

(a) The general character of the property.

(b) Appellant's membership is property with a business situs in New York.

(c) Appellant's membership being property with a business situs in this State, the profit derived from the sale of a fractional membership was properly subjected to the New York Personal Income Tax.

## ARGUMENT.

### I.

**Appellant so employed his membership in the New York Stock Exchange that it acquired a business situs in the State of New York and the profit derived by appellant from the sale of a fractional membership constituted taxable income in New York.**

**(a)**

**The general character of the property.**

That a membership in the New York Stock Exchange is property seems to be well settled in law; it is, however, a species of property difficult of exact definition. While it partakes generally of the nature of an intangible, it has some peculiarities. It is very definitely and inextricably linked to the tangible real property of the New York Stock Exchange, which real property is located in New York State. Regarded from the standpoint of substance alone, and unaffected by the form of the ownership, this unincorporated association, of which appellant is a member, owns the fee of this real property, which is held primarily to facilitate the carrying on of the affairs of the Exchange and not as a means of profit. Hence, membership embodies an equity in tangible property located here. In addition, membership vests the holder with a definite, very valuable and exclusive privilege—that of conducting a business in the buying and selling of stocks and bonds upon the greatest market place of its kind in the world —a business limited to the owner and his fellow mem-

bers of the Exchange. *Finally, it unquestionably represents the member's share or interest in a New York business—the business conducted by the Exchange of furnishing a market place for securities, with all the facilities essential thereto.*

It is property of great value of which but a lesser proportion is what might be termed its book value, or the proportionate value of the assets of the Exchange itself if liquidated and distributed among the members. Its greatest value flows from the worth of the privilege that it confers upon its owner of trading, for himself or for others, upon the floor of the Exchange, in listed stocks and bonds. Hence, its value fluctuates with the volume of such trading, all of which is carried on within the State of New York.

Memberships in stock exchanges have been the subjects of litigation and adjudication in the Courts of this State. Thus, a membership has been held to be property which passes to a trustee in bankruptcy when the owner has been adjudged a bankrupt.

*Platt v. Jones*, 96 N. Y. 24.
*O'Dell v. Boyden*, 150 Fed. 731.

Such a membership has been held to be capital invested in business in this State.

*People ex rel. Lemmon v. Feitner*, 167 N. Y. 1.

A membership in the New York Stock Exchange has been held to be "property" within the meaning of former §242 (now §243) of the Tax Law and liable to the transfer tax.

*Matter of Hellmann*, 174 N. Y. 254.

A membership in the New York Stock Exchange, owned by a non-resident of this State, upon the death of such non-resident has been held subject to a transfer tax in this State.

*Matter of Glendinning*, 68 App. Div. 125; affirmed 171 N. Y. 684.

In the *Glendinning* case the Court, in discussing the decision in the Feitner case, said:

> "But an examination of the opinions delivered by the Court in that case shows that although such a seat on the New York Stock Exchange is not personal property under the restricted definition of the Tax Law (Laws of 1896, Chap. 908, §2, subd. 5, as am'd by Laws of 1901, Chap. 490) yet it is undoubtedly capital invested in business in this state which has a market value and can be bought and sold. If it is capital invested in business in this state, it is property, as it is difficult to see how capital invested in business, which has a market value and can be bought and sold does not fall within the term 'property'. The restrictions under which this property is held in no way affect its character."

**(b)**

**Appellant's membership is property with a business situs in New York.**

The maxim "*mobilia sequuntur personam*" is one that is frequently invoked when situs of an intangible is sought for the purposes of taxation, but the Courts have also recognized the existence of a "business situs" of an intangible—that is, the use of intangible property in connection with a business in a State other than that of the owner's domicile in such a manner that the property is held to have attained a business situs in such foreign jurisdiction so as to render it subject to taxation in that jurisdiction.

In Cooley on Taxation, Fourth Edition, Volume 2, §465, it is stated:

> "'Business situs' has come to be a well recognized term in the law of taxation. Primarily it is an exception to the rule that the situs of intangible personal property is at the domicile of the owner, so as to make property which has acquired a 'business situs' in a state other than the domicile of the owner, taxable in such state."

The rule of business situs has been applied to a branch brokerage business conducted through a local agent.

*Berton, Griscom & Jenks v. City of New Orleans,* 131 La. 73; 59 So. 19.

The existence of a business situs as applied to intangibles for taxation purposes has been recognized by this Court.

*New Orleans v. Stempel,* 175 U. S. 309;
*Bristol v. Washington County,* 177 U. S. 133;
*Board of Assessors v. Comptoir National,* 191 U. S. 388;
*Metropolitan Life Insurance Co. v. New Orleans,* 205 U. S. 395;
*Liverpool & L. & G. Ins. Co. v. Orleans Assessors,* 221 U. S. 346.

That this exception to the general rule of the situs of intangible personal property is still adhered to by this Court can best be established by quoting the words of Mr. Justice McReynolds in *Farmers Loan Co. v. Minnesota,* 280 U. S. 204, at page 213:

> "*New Orleans v. Stempel,* 175 U. S. 309, *Bristol v. Washington County,* 177 U. S. 133, *Liverpool & L. & G. Ins. Co. v. Orleans Assessors,* 221 U. S.

346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile."

See also, *Wheeling Steel Corp. v. Fox,* 298 U. S. 193.

In *Bristol v. Washington County,* 177 U. S. 133, *supra,* at page 141, this Court quoted with approval from the case of *In Re Jefferson,* 35 Minnesota 215, the following:

"For many purposes the domicile of the owner is deemed the situs of his personal property. This, however, is only a fiction, from motives of convenience, and is not of universal application, but yields to the actual situs of the property when justice requires that it should. It is not allowed to be controlling in matters of taxation. Thus, corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned,—at the domicile of the creditor. The creditor, however, may give it a business situs elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view of reloaning the money and keeping it invested as a permanent business."

And in *National Leather Co. v. Massachusetts,* 277 U. S. 413, plaintiff, a Maine corporation doing business in Massachusetts, owned all of the capital stock of two subsidiary Maine corporations which operated tanneries in Massachusetts. In the measure of a franchise tax assessed against plaintiff, there was included the value of the stocks of the foreign subsidiaries.

Concededly, the situs of these intangibles was at plaintiff's domicile but because plaintiff "through its ownership of the capital stock of the two subsidiary corporations and the control which it thereby exercised over them, did, in a very real and practical sense, employ these stocks as an instrumentality in carrying on its business within Massachusetts" (p. 423) this Court upheld the imposition of the tax, necessarily ascribing a business situs in Massachusetts to these intangibles.

The maxim *mobilia sequuntur personam* is but a legal fiction which must yield before the fact of the actual employment of an intangible in a State other than that of the owner's domicile. And what is the fact here, as against the operation of a legal fiction? The fact is that appellant has been able, through a New York agent, to conduct sizable and profitable transactions in securities in his Boston brokerage business because of his interest in a New York business—the business of the New York Stock Exchange. Those transactions were conducted through the medium of an agent in New York, but at all times appellant was fully possessed of the right to go upon the floor of the Exchange in New York and conduct the trading himself. Surely, if it were practicable for appellant to commute daily to New York, go upon the floor of the Exchange and personally execute his firm's purchases and sales, there could be no doubt that a business situs in New York would attach to his membership. Does it then, from the standpoint of substance, make any real difference that the transactions were consummated through an agent, rather than personally? We think not, and submit that the transaction of $150,000,000 worth of sales and purchases of securities in New

York, for the account of appellant's firm, made profitably possible only because of appellant's Stock Exchange membership, indelibly endowed that membership with a business situs in New York, whether appellant traded here personally or through a fellow-member, as his agent.

Appellant's argument that he was never in New York and did not personally make use of the rights and privileges attaching to his membership (P. 20 of Brief), is an implicit admission that, had he done so, the tax here involved would have been unobjectionable. But appellant testified (R. 63) that he always recognized the New York members who transacted his firm's business on the Exchange as "our agents for executing the orders". In such circumstances, we believe it is of no consequence whether appellant made personal use of the rights and privileges which his membership gave him or accomplished substantially the same result through an agent.

Appellant, together with his 1099 fellow members, *was* the New York Stock Exchange. Although set up in the form of an unincorporated association, the Exchange virtually amounts to a partnership. Its capital is supplied by its members or "partners." Thus, appellant was called upon to make a contribution in 1929 to the Exchange to augment or replenish its capital. Without any question, it is controlled and managed by officers chosen by the members or "partners". The fact that the Exchange itself does not function for profit cannot alter the conclusion that it conducts a business—the business of supplying what is undoubtedly the greatest marketplace of its kind in the world.

Because of the peculiar nature of its activities, no *direct* annual profits or earnings accrue to its members. Membership has, however, come to have great value, which fluctuates with the volume of business done upon the Exchange, for the reason that the greater the volume of dealings in securities done through the facilities of this New York business, the greater value the privilege of membership has. And it has greater value only because of the greater profits made possible through the exercise of the privilege conferred by membership.

Assuredly, the members must share the expenses and losses of the Exchange, as evidenced by appellant's contribution to the capital of the Exchange. While not formed primarily for profitable operation itself, any gains which might result would most surely accrue to the members of the Exchange.

Let us assume that the Exchange building should be sold at a great profit. Can there be any doubt that the gain would inure to the benefit of the members? Under the circumstances, we think that the New York Stock Exchange may be said for most purposes, including taxation, to constitute a partnership.'

Thus, in *Ludlum v. Wagner*, 212 App. Div. 779, the Court held that a voluntary association consisting of 145 persons, having a president, treasurer and trustees, was, in fact, a partnership.

The matter was dealt with in the Personal Income Tax Regulations (Manual 29) promulgated by the State Tax Commission. Thus, Article 228 read:

"Association distinguished from partnership. An organization, the partnership interests in which are not transferable without the consent of the members, is a partnership and not an association. Any so-called association or organization not taxable under article 9-a of the tax law and not exempted under such article, will be regarded as a partnership within the meaning of the income tax law. The members of such partnerships will be required to include in their returns their share of the profits of such partnerships, whether distributed or undistributed. Such partnerships will be required to file returns in the same manner as all other partnerships."

The New York Stock Exchange is not taxable under Article 9-a of the Tax Law (Corporation Franchise Tax), nor is it exempted under such article. It would seem to follow that, for the purposes of the personal income tax law, the Exchange constitutes a partnership; and, of course, if that be so, there can be no question that it is a New York partnership. This brings us to the inevitable conclusion that appellant herein, as a member of the Exchange, was a partner in a New York partnership, employing such partnership interest in connection with his Boston brokerage business.

The Exchange has further characteristics of a partnership. Thus, it exercises close supervision over the admission of new members. Appellant could only dispose of his membership, and of his fractional membership, through and with the approval of the Exchange. This illustrates the personal relationship between the members, comparable to that of a partnership.

In *Belton v. Hatch,* 109 N. Y. 593, the Court held that the New York Stock Exchange could not be said to be

strictly a copartnership for the sole reason, apparently, that the objects for which the Exchange was formed do not come within the definition of a partnership. Judge Gray said, however, page 596,

> "It may be said however, that the rights of the associates are not substantially different from those of partners, so far as their rights in the property of the association are concerned."

By virtue of his membership, appellant had the right to deal personally upon the floor of the Exchange or, if he preferred, through the agency of another member, at reduced commission rates. He chose to transact his business in the latter way and, in 1929, dealt in some 3,000,000 shares of stock, mostly for customers of his Boston brokerage firm.

It is unquestioned that the Exchange functions under the protection of the laws of this State. Similarly, the protection of the laws of this State extended to appellant's interest in this New York business. We submit that membership in the Exchange, when held by a non-resident and used for trading purposes here, either directly or in conjunction with another member as agent, is intangible personal property having a business situs in this State.

The situation here is akin to that in the case of *New Orleans v. Stempel*, 175 U. S. 309, *supra*, where the New York resident conducted through an agent in Louisiana, a business of loaning money on Louisiana real estate and the mortgages in possession of his agent there, were held to have a taxable situs in Louisiana. And to that in *Bristol v. Washington County*, 177 U. S. 133, *supra*, where a New York resident conducted a

loaning business in Minnesota, through the medium of a Minnesota agent, and the intangibles, the evidence of the debts, were considered to have attained a business situs for taxation in Minnesota. And to that in *Liverpool & L. & G. Ins. Co. v. Orleans Assessors*, 221 U. S. 346, *supra*, where the Court said, page 354:

> "The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the state, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power could be attributed to these credits, they could be localized there."

Here, through the medium of a New York agent, appellant participated in and made use of the privileges and facilities of a New York business—the New York Stock Exchange. If locality can be attributed to appellant's membership in the Exchange, assuredly it must be said to be localized in this State.

The essentially localized nature of the activities of the New York Stock Exchange has been emphasized by the Exchange itself. Early in 1934 the Congress, through a Committee, held hearings upon the Fletcher-Rayburn Stock Exchange Control bill, and in connection therewith there was filed on behalf of the New York Stock Exchange a brief questioning the constitutionality of the proposed legislation. The brief was submitted by Hunton, Williams, Anderson, Gay and Moore, Esqs., Electric Building, Richmond, Virginia, Counsel for New York Stock Exchange, Thomas B. Gay of Counsel.

The general tenor of the brief is to the effect that the activities and functions of the New York Stock Exchange are essentially localized in New York and are not so directly related to interstate commerce as to be fairly comprehended within the power of the Congress to regulate such commerce.

Bearing upon the localized nature of the activities and functions of the Stock Exchange and of its members, we quote from the Stock Exchange brief as follows:

"THE NATURE OF THE BUSINESS SOUGHT TO BE REGULATED.

"The business of a stock exchange is to centralize the purchase and sale of securities. Sales are made only between members of the exchange and, in the case of the New York Stock Exchange, the transactions occur only in its building in the city of New York.

"The purchases and sales made by members on the floor of the New York Stock Exchange are completed by actual delivery, either through the place for central delivery maintained by a subsidiary of the exchange or directly between the offices of the members which, under the rules of the exchange, must be located in its immediate vicinity. Therefore, the actual contracts of purchase and sale take place only in New York City, and all deliveries of securities and payment of money in connection with the performance of these contracts likewise occur solely in New York City.

"The immediate objects of sale are bonds or certificates of stock. In the case of bonds listed on the New York Stock Exchange, not only are the instruments themselves evidences of debt, but, under the rules of the exchange, the issuing corporations must maintain offices or paying agencies in the city of New York at which both principal and interest are payable.

"In the case of certificates of stock, they are constituents of title and, under the rules of the

> exchange, the issuing companies must maintain transfer agents and registrars in New York City where such certificates may be transferred of record." (New York Times, March 8, 1934.)

The case of *Citizens National Bank v. Durr*, 257 U. S. 99, involved the imposition of an Ohio property tax on a membership in the New York Stock Exchange owned by a resident of Ohio. This Court upheld the imposition of the tax but strongly intimated that such membership was also taxable in New York. At page 109, this Court said:

> "Nor is plaintiff's case stronger if we assume that the membership privileges exercisable locally in New York enable that state to tax them even as against a resident of Ohio."

Mr. Justices Holmes dissented, and wrote, page 110:

> "If left to myself I should have thought that the foundation and substance of the plaintiff's right was the right of himself and his associates personally to enter the New York Stock Exchange building and to do business there. I should have thought that all the rest was incidental to that and that that on its face was localized in New York. If so, it does not matter whether it is real or personal property or that it adds to the owner's credit and facilities in Ohio. The same would be true of a great estate in New York land."

**(c)**

**Appellant's membership being property with a business situs in this State, the profit derived from the sale of a fractional membership was properly subjected to the New York Personal Income Tax.**

Appellant suggests (p. 11 of Brief) an analogy between the ownership of an Exchange membership and

the ownership of stocks, bonds or other securities. Beyond the fact that each constitutes a species of intangible personal property, there is not the slightest similarity. The Exchange membership represents, primarily, an extremely valuable privilege exercisable, in the final analysis, only in New York. It has worth only as it may be employed in connection with other activities; by itself, it yields no interest or dividends and is severely restricted as to negotiability. We deem it unnecessary to discuss the characteristics of stock and bonds, or to enlarge further upon the fundamental differences between a Stock Exchange membership and a share of stock or a bond.

The fundamental, ultimate and indubitable justification of all taxation arises from the subjection of persons or property to the control of the sovereignty which seeks to impose the tax, and from the benefit to the person or property of the protection of that sovereignty and its laws.

*First National Bank v. Maine,* 284 U. S. 312, at page 334.

Certainly it cannot be questioned that the New York Stock Exchange itself functions under the laws and the protection of the sovereignty of the State of New York. Its property is in this State and the valuable rights and privileges which it confers upon its members must be exercised in this State. Members of the Exchange have time and again sought relief in the Courts of this State in settlement of controversies arising from the rights and obligations conferred by their membership in the Exchange.

A membership in a Stock Exchange has been held to be taxable both at the domicile of the owner and at the location of the Exchange.

*Rogers v. Hennepin County*, 240 U. S. 184.

That case involved the taxation of memberships in the Minneapolis Chamber of Commerce, as affecting members who were (1) residents of Minneapolis, (2) residents of Minnesota, outside of Minneapolis, and (3) residents of other States. With respect to all members residing outside of Minneapolis, it is stated (p. 186) that such members did not operate upon the exchange personally, except at rare intervals, and that their use of their memberships was practically limited to dealing through other members at reduced rates, exactly as in the instant case.

This Court held that the memberships of such non-residents, nevertheless, were taxable at the place where the exchange was located. Mr. Justice Hughes wrote, page 191:

> "There is the further contention with respect to the authority of the State to tax the memberships owned by citizens of other states. It is urged that the memberships are intangible rights held by the member at his domicile. *But it sufficiently appears from the allegations that the memberships represented rights and privileges which were exercised in transactions at the Exchange in the City of Minneapolis, and we are of the opinion, applying a principle which has had recognition with respect to credits in favor of non-residents arising from business within the State,* and in the case of shares of stock of domestic corporations, that it was competent for the State to fix the situs of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the State where the exchange was located." (Emphasis ours.)

As authority, Mr. Justice Hughes cited *New Orleans v. Stempel,* 175 U. S. 309, 319, and *Liverpool Ins. Co. v. Orleans Assessors,* 221 U. S. 346, 354, 355; and, as we have noted earlier in our brief, these are the same cases cited with approval in *Farmers Loan Co. v. Minnesota, supra.*

*Rogers v. Hennepin County* affirmed a decision of the Minnesota Supreme Court,

*Rogers v. Hennepin County,* 124 Minnesota 539; 145 N. W. 112,

which case in turn was based on the decision in *State v. McPhail,* 124 Minnesota 398; 145 N. W. 108, in which latter case is found a detailed and exhaustive review of the decisions of various states applicable to the question.

A later case in Minnesota, involving the taxation of memberships in the Minneapolis Chamber of Commerce, was *State ex rel. Goetzman v. Lord,* 136 Minnesota 260; 161 N. W. 517, in which the Court reviewed the earlier decisions and said:

> "One of the relators is a resident of Minneapolis, another is a resident of the state outside of Minneapolis, and the other is a non-resident of the state. A question is made as to the proper place of taxation. The character of the rights and privileges which attend memberships is sufficiently stated in *State v. McPhail,* 124 Minnesota 398. * * * Such rights and privileges give whatever value there is in the memberships in excess of the value of the tangible property of the Chamber. They are exercisable only at Minneapolis. For the purpose of the taxation of such excess value the memberships, though owned without the state, or within the state, but without Minneapolis, have a situs here."

*Rogers v. Hennepin County,* 240 U. S. 184, *supra,* is controlling and conclusive as an authority for the proposition that the State of New York may fix the situs of a membership in the New York Stock Exchange as being in this State, for the purposes of taxation. The principle established in *Rogers v. Hennepin County* has not been modified by recent decisions of this Court dealing with the tax situs of intangibles.

*Safe Deposit & Trust Co. v. Virginia,* 280 U. S. 83;

*Farmers Loan & Trust Co. v. Minnesota,* 280 U. S. 204;

*Baldwin v. Missouri,* 281 U. S. 506;

*First National Bank v. Maine,* 284 U. S. 312.

In the *Safe Deposit & Trust Co.* case, the Court specifically recognized the existence of a business situs as applied to intangibles and said, at page 93:

> "Intangible personal property may acquire a taxable situs where permanently located, employed and protected."

And in the *Farmers Loan Company* case, at page 213, the Court again recognized this principle and stated that the record in the instant case gave no occasion for the Court to inquire whether the securities could be taxed a second time at the owner's domicile. And in the same case, at page 215, Mr. Justice Stone, in a concurring opinion, said:

> "Hitherto the fact that taxation is 'double' has not been deemed to affect its constitutionality and there are, I think, too many situations in which a single economic interest may have such legal relationships with different taxing jurisdictions as to justify its taxation in both, to admit of our laying down any constitutional principle broadly prohib-

iting taxation merely because it is double, at least until that characterization is more precisely defined.

"It seems to me to be unnecessary and undesirable to lay down any doctrine whose extent and content are so dubious. Whether it is far reaching enough to overturn those cases which, in circumstances differing somewhat from the present, have been regarded as permitting taxation in more than one state, reaching the same economic interest, is so uncertain as to suggest doubts of its trustworthiness and utility as a principle of judicial decision."

It may be noted that appellant concedes (P. 15 of Brief) that no question of double or multiple taxation is here involved, the single issue being jurisdiction to tax.

In *Baldwin v. Missouri,* at page 590, the Court said:

"It does not appear and is not claimed that either the decedent or her son ever resided in Missouri. The record discloses nothing tending to show that the personal property had been given a business situs in that state."

The exception, and the reaffirmance of the existence of such a thing as a business situs applied to intangibles appear very clearly in the *First National Bank* case, at page 331. Mr. Justice Sutherland says:

"We do not overlook the possibility that shares of stock, *as well as other intangibles,* may be so used in a state other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See *Farmers Loan Company* case, *supra,* at page 213. That question heretofore has been reserved and it still is reserved to be disposed of when, if ever, it properly be presented for our consideration." (Italics ours.)

In *Beidler v. South Carolina*, 282 U. S. 1, it was held that it was the Court's province to inquire whether there was evidence that the debts there in question had acquired a business situs, the State of South Carolina having sought to sustain the tax upon the ground that the business had attained a business situs in that State. This Court reversed the Court below upon the ground that the evidence was inadequate to afford a basis for a finding that the indebtedness had a business situs in South Carolina. But the entire tenor of the decision clearly indicates that this Court recognizes that an intangible may acquire such a situs for the purpose of taxation.

While the legal title to the real property of the Exchange in this State is in a corporation, certainly the equitable ownership is in the members; each member's interest is identical with that of every other member; each has the same capital interest and each is entitled to identical benefits.

We submit that a membership in the New York Stock Exchange, being property so intimately and closely entwined with tangible real property located in this State and carrying with it rights and privileges of great value exercisable in transactions conducted within this State, and representing, as we believe, for all practical intents and purposes, the interest of a partner in a New York business, must be considered to be property having a business situs in New York State and hence subject to taxation in the State of New York.

Appellant asserts (P. 17 of Brief) that the instant proceeding is in no wise controlled by the cases of

*People ex rel. Blagden v. Lynch*, 263 N. Y. 568; appeal dismissed and certiorari denied, 292 U. S. 602, and *People ex rel. Sackett v. Lynch*, 263 N. Y. 570; appeal dismissed 291 U. S. 652, because neither appellant nor his partners nor his firm ever had a place of abode or of business in this State. While these cases are distinguishable upon the ground that the taxpayers there had been engaged in the brokerage business in New York, the fact, nevertheless, remains that liability to an income tax was asserted upon both statutory grounds; namely, that the profit there arising from the sale of their memberships in the Exchange constituted income from a New York business and constituted income from property owned in this State. It will be recalled that in the *Blagden* case it was a conceded fact that the taxpayer retired from business in New York on or before December 31, 1927, and that he bought and sold no securities nor, in any other manner, used his Exchange membership for business purposes after that date. The sale of the membership took place in 1928.

No opinion was written by the State Courts to indicate whether judicial confirmation of the Tax Commission's determination rested upon either or both of these bases. That both grounds for imposing the tax were considered appears from the memorandum dissent of Judge Lehman in the *Blagden* case, wherein he expressed his belief that income from the sale of the Stock Exchange membership in question constituted "no profits of any business and the intangible personal property had no situs in New York *at the time of the assessment*, even assuming that the State of New York would have power to tax intangible personal property

which has a business situs within the State." (Italics ours.)

Appellant suggests (P. 28 of Brief) that there can be no basis for imputing a business situs in the instant case, for the reason that there was no business transacted here. We submit that the purchase and sale in 1929 of 3,000,000 shares of stock worth $150,000,000 transacted in New York by agents of appellant and his firm, by whom the trading was originated and to whom sixty per cent of the commission accrued, constituted a most substantial business transacted here; and where that business was made possible only because of appellant's membership in the New York Stock Exchange, then that membership has business situs in this State.

**It is respectfully submitted that the final order and judgment of the Supreme Court of the State of New York should be affirmed.**

Respectfully submitted,

JOHN J. BENNETT, JR.,
*Attorney-General of the State of New York,*
*Attorney for Appellees.*

JOSEPH M. MESNIG,
*Assistant Attorney-General,*

HENRY EPSTEIN,
*Solicitor General,*
*Counsel for Appellees.*

# SUPREME COURT OF THE UNITED STATES.

No. 218.—October Term, 1936.

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| The People of the State of New York, *ex rel.* C. Handasyde Whitney, Appellant, *vs.* Mark Graves, John P. Hennessey and John J. Merrill, Tax Commissioners of the State of New York. | Appeal from the Supreme Court of the State of New York. |

[January 4, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The question here presented relates to the constitutional validity of a tax imposed by the State of New York upon the profits realized by a non-resident upon the sale of a right appurtenant to membership in the New York Stock Exchange.

The relator, C. Handasyde Whitney, is a resident of the Commonwealth of Massachusetts and a member of a firm doing business in Boston. He and his copartners own a membership in the New York Stock Exchange. The membership stands in the relator's name. In 1929, by virtue of an increase in the number of members of the Exchange, each member became entitled to a "right" to one-fourth of a new membership. The relator sold that right for $108,000. The Tax Commission of New York, under sections 351 and 351-a of the Tax Law of that State, assessed a tax upon the profits derived from the sale, which were calculated at the difference between original cost, together with contributions paid in the form of dues, and the proceeds of the sale. The tax was paid under protest and the relator sought revision under the pertinent provision of the state law. The Tax Commission denied the application. The relator then obtained a writ of certiorari from the state court to review the commission's action and the commission made return embracing the record of its proceedings. In accordance with the state practice, the matter was heard by the Appellate Division of the Supreme Court which sustained the determination of the commission. 246 App. Div. 652. That ruling was affirmed

by the Court of Appeals, without opinion. Subsequently that court amended its remittitur by reciting that upon the appeal the relator contended that the assessment of the tax under the provisions of the state act "contravenes the Fourteenth Amendment of the Federal Constitution as an extraterritorial tax, and such question was presented and necessarily passed upon but not sustained by the court". 271 N. Y. 594, 618. The case comes here on appeal.

Aside from a brief statement of facts, the state courts have not aided us by a discussion or analysis of the nature of the right involved or the grounds for the assertion of the authority to lay the tax. From the record it appears that the New York Stock Exchange is an unincorporated voluntary association, limited as to membership and governed by its own constitution, by-laws and rules; that it holds the beneficial ownership of the entire capital stock of a New York corporation which owns the building in which the business of the Exchange is transacted, with the land upon which it stands, situated in the city of New York; that membership or seat in the Exchange carries with it valuable privileges and has a market value for the purpose of sale; that the Exchange is supported by dues and charges paid by its members and that contributions are also made to a "gratuity fund" which is in substance an insurance fund for the benefit of the widow and descendants of deceased members; that membership is evidenced by a certificate in the form of a letter signed by the secretary of the Exchange; that the membership can be transferred only through the Exchange and with its approval; that a member may personally buy or sell only in the Exchange building; that a member may buy or sell for the account of other members at a commission substantially less than that charged to a non-member; and that such rights and privileges are valuable and are exercisable only in transactions conducted at the Exchange building in the city of New York.[1]

The relator, in challenging the jurisdiction of the State of New York to lay the tax, stresses the points that the relator and his co-partners have always been domiciled in Massachusetts; that they have never had an office or abode in New York and have never carried on business there; that while they advertise themselves in

[1] See Belton *v.* Hatch, 109 N. Y. 593, 595, 596; People *ex rel.* Lemmon *v.* Feitner, 167 N. Y. 1, 4, 11, 13; Meyer, "The Law of Stock Brokers and Stock Exchanges," pp. 13-16, 75-79.

Boston as members of the New York Stock Exchange and accept orders from customers at their Boston office for execution on the New York Stock Exchange, none of that business is conducted by the relator or his copartners on the floor of that Exchange; that they do not buy and sell securities on the Exchange for their firm account; that orders requiring execution on the Exchange are telegraphed to members of the Exchange who have business offices in New York and who execute their orders on the Exchange in their own names, acting as correspondents, lending money on the security of the stock purchased and other collateral delivered to them. This business of relator's firm in 1929 involved approximately $150,000,000 worth of securities. And it appears that by reason of relator's membership in the Exchange, his firm was able to have their New York correspondents execute orders at forty per cent. of the commission fixed for non-members. Relator's firm charges its customers the fixed minimum commissions which they would have to pay any stock exchange house, and these commissions are divided with their New York correspondents by mutual agreement.

The relator's argument is that the membership in the Exchange is intangible personal property, that as a general rule property of that sort is taxable only at the domicile of the owner, and that unless the membership has a "business situs" in New York it is not taxable there. *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 213; *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1, 8; *First National Bank* v. *Maine,* 284 U. S. 312, 329, 331; *Wheeling Steel Corporation* v. *Fox,* 298 U. S. 193, 209-211. He contends that the membership cannot be said to have a business situs in New York because he and his copartners reside and transact all their business in Massachusetts.

We think that the argument fails to give adequate consideration to the nature and incidents of the membership. When we speak of a "business situs" of intangible property in the taxing State we are indulging in a metaphor. We express the idea of localization by virtue of the attributes of the intangible right in relation to the conduct of affairs at a particular place. The right may grow out of the actual transactions of a localized business or the right may be identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place. In the

latter case the localization for the purpose of transacting business may constitute a business situs quite as clearly as the conduct of the business itself.

Here, we are dealing with an intangible right of a peculiar nature. It embraces the privilege of a member to transact business on the Exchange as well as a valuable right of property which is the subject of transfer with the approval of the Exchange and may survive resignation, expulsion or death.[2] In both aspects the right is held and can be exercised only in subjection to the constitution, by-laws and rules of the Exchange. The Exchange is a market place. The privilege which inheres in the membership is the right to conduct transactions at that market place. That privilege of conducting the business of the buying and selling of securities on the floor of the Exchange is the dominant feature of the membership or "seat". Its very nature localizes it at the Exchange. It is a privilege which can be exercised nowhere else. The nature of that right is not altered by the failure to exercise it. Wherever the owner may reside he must go to the Exchange to exercise his privilege to trade upon its floor. If he prefers to have his customers' orders executed through other members, still they must execute these orders on the Exchange under its rules. Such orders are executed on his behalf, and by virtue of his membership and of the execution of his orders upon the Exchange he becomes entitled to the concession in commissions for which the rules provide.

Our decisions do not support the relator's contention. In *Rogers* v. *Hennepin County*, 240 U. S. 184, the question related to memberships in the Chamber of Commerce of the city of Minneapolis. It was urged on behalf of the citizens of other States that their memberships were intangible rights held at their domicile. But we decided that they were taxable in Minnesota. While it was said that the memberships represented rights and privileges which appeared to have been actually exercised at the Exchange in Minneapolis, the underlying consideration was the nature of the right and privilege which made those transactions possible. In *Citizens National Bank* v. *Durr*, 257 U. S. 99, a membership in the New York Stock Exchange, owned by a resident of Ohio, was held to be subject to taxation at his domicile. But the Court was care-

[2] Weston *v.* Ives, 97 N. Y. 232; Belton *v.* Hatch, 109 N. Y. 593; Matter of Grant, 132 App. Div. (N. Y.) 739, 742; Hyde *v.* Woods, 94 U. S. 523; Sparhawk *v.* Yerkes, 142 U. S. 1, 12; Meyer, *op. cit.*, pp. 115-117.

ful not to question the jurisdiction of the State of New York to tax "the membership privileges exercisable locally" in that State (*Id.*, pp. 109, 111) and what the Court said with respect to double taxation must be read in the light of the decisions in *Farmers Loan & Trust Co.* v. *Minnesota, supra,* and later cases upon that point. See *Wheeling Steel Corporation* v. *Fox, supra.*

We think that the dominant attribute of relator's membership in the New York Stock Exchange so links it to the situs of the Exchange as to localize it at that place and hence to bring it within the taxing power of New York. Accordingly we hold that in laying the tax upon the profits derived by the relator from the sale of the right appurtenant to his membership the State did not exceed the bounds of its jurisdiction. The judgment is affirmed.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*